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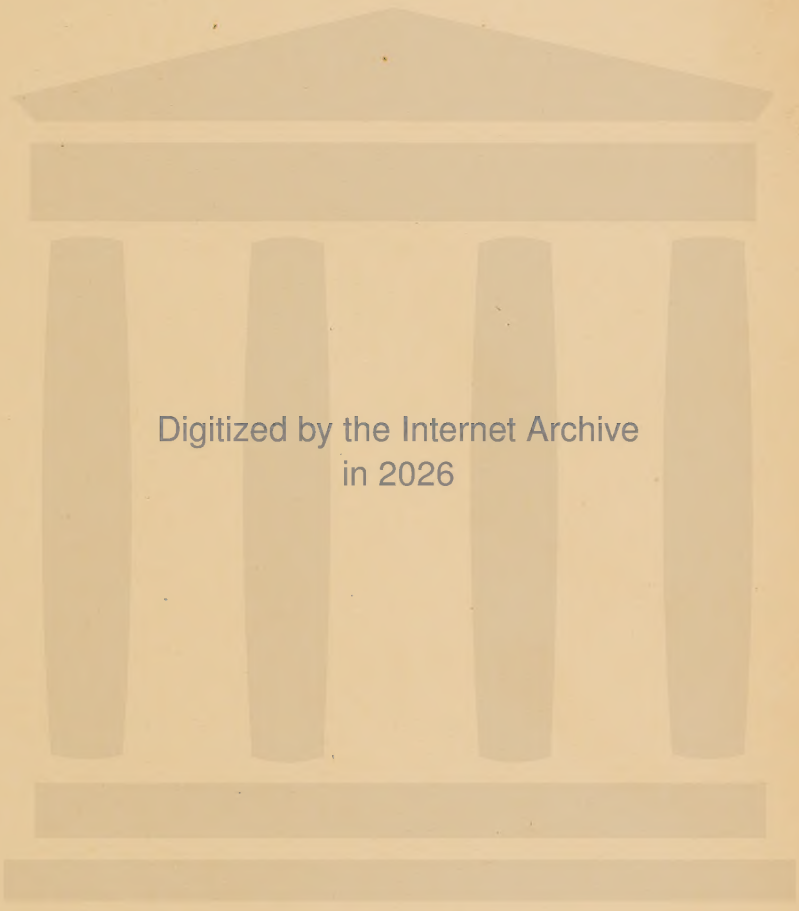

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1900.

THE

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

AND

PEERAGE CASES.

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MEMORANDA.

1899. *Dec.* 25. The Right Honourable Lord Ludlow *died at his residence* 8 *Cromwell Place in his* 72*nd year.*

In the Vacation after Michaelmas Sittings, 1899, The Honourable Sir Ford North *resigned his office of Judge of the High Court of Justice. He was afterwards sworn of the Privy Council.*

1900. *Jan.* 11. Henry Burton Buckley, Q.C., *was appointed a Judge of the High Court of Justice, and was afterwards Knighted.*

May 10. Sir Richard Everard Webster, Bart., G.C.M.G., *was appointed Master of the Rolls in the place of* The Right Honourable Sir Nathaniel Lindley, *resigned, and was afterwards sworn of the Privy Council.*

May 11. Sir Robert Bannatyne Finlay, Q.C., *was appointed Attorney-General, and* The Right Honourable Edward Henry Carson, Q.C., *was appointed Solicitor-General.*

May 14. Sir Nathaniel Lindley *was appointed a Lord of Appeal in Ordinary under The Appellate Jurisdiction Act,* 1876, *in the place of* Michael Lord Morris, *resigned, and was created a Baron for life by the name of* Baron Lindley of East Carleton, *in the County of Norfolk.*

June 15. Michael Lord Morris *was created a Baron of the United Kingdom by the name of* Baron Killanin of Galway, *in the County of Galway, and* The Right Honourable Sir Richard Everard Webster, *Master of the Rolls, was also created a Baron of the United Kingdom by the name of* Lord Alverstone of Alverstone, *in the Isle of Wight and County of Southampton.*

Aug. 10. The Right Honourable Lord Russell of Killowen, *Lord Chief Justice of England, died at his residence in Cromwell Houses in his* 68*th year.*

Oct. 22. The Right Honourable Lord Alverstone *was appointed Lord Chief Justice of England in the place of* The Right Honourable Lord Russell of Killowen, *deceased.*

Oct. 23. THE RIGHT HONOURABLE SIR ARCHIBALD LEVIN SMITH, *one of the Lord Justices of Appeal, was appointed Master of the Rolls in the place of* LORD ALVERSTONE, *resigned.*

Oct. 27. THE HONOURABLE SIR JAMES STIRLING, *one of the Judges of the High Court of Justice, was appointed a Lord Justice of Appeal, and was afterwards sworn of the Privy Council.*

Oct. 31. MATTHEW INGLE JOYCE, ESQ., *was appointed one of the Justices of the High Court of Justice, in the place of* SIR JAMES STIRLING, *and was afterwards Knighted.*

ERRATUM.

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

THE NATIONAL TELEPHONE COMPANY, LIMITED . . . . . } APPELLANTS;

AND

THE COMMISSIONERS OF INLAND REVENUE . . . . . } RESPONDENTS.

H. L. (E.)
1899
Nov. 28.

Revenue—Stamp—Agreement for Hire of Chattel in consideration of Yearly Payment—"Bond, Covenant, or Instrument of any kind whatsoever"—Stamp Act 1891 (*c.* 39) *Sched. I.*

The words "Bond, Covenant, or Instrument of any kind whatsoever" in the 1st schedule to the Stamp Act 1891 include an agreement not under seal.

The decision of the Court of Appeal, [1899] 1 Q. B. 250, affirmed.

THIS appeal raised the question stated in the head-note. The facts and arguments are set forth carefully, elaborately and in detail in the report below. (1) Nothing new and important came out in this House.

Asquith Q.C. and *Roskill*, for the appellants.

Sir R. Finlay S.-G. (*Danckwerts* with him) was stopped.

(1) [1899] 1 Q. B. 250.

H. L. (E.)
1899
NATIONAL TELEPHONE COMPANY v. INLAND REVENUE COMMISSIONERS.

EARL OF HALSBURY L.C. My Lords, my opinion upon this matter may be stated as shortly as the Solicitor-General's argument. The real truth is that this Taxing Act intended, as it appears to me, to apply taxation to every document of this kind; it mentions in the first instance those under seal, and then it occurred to the framers of the Act, Well, but unless we add some words that will bring within the ambit of taxation documents which do exactly the same thing as the instruments under seal, the result will be that whoever does not particularly care about its being an instrument under seal but wants to effect the same object, will escape taxation by simply omitting the sealing and delivering and merely signing the document in question. Therefore they added the word "whatsoever," and I think they intended to include everything of that character. My Lords, my opinion is that this document is of that nature and that therefore this judgment ought to be affirmed, and I move your Lordships accordingly.

LORDS MACNAGHTEN, BRAMPTON and ROBERTSON concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, November 28, 1899.

Solicitor for appellants: *W. E. L. Gaine.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

THE HAMPTON URBAN DISTRICT COUNCIL . . . . . } APPELLANTS;

AND

THE SOUTHWARK AND VAUXHALL WATER COMPANY . . . . . } RESPONDENTS.

H. L. (E.) 1899 Nov. 30.

Local Government — Rates — District Rate — "Land covered with Water" — Artificial Reservoir — Proportionate Rating — Public Health Act 1875 (*c.* 55) *s.* 211 *sub-s.* 1 (*b*).

An artificial reservoir is "land covered with water," for the purpose of assessment in the proportion of one-fourth part only of its annual value under the Public Health Act 1875 s. 211 sub-s. 1 (*b*).

The decision of the Court of Appeal, [1899] 1 Q. B. 273, affirmed on this point.

THIS appeal raised the question stated in the head-note. Nothing new and worth recording was added to the arguments in the Court of Appeal, which are fully reported in the report below. (1)

Sir Edward Clarke Q.C., and *Courthope-Munroe* for the appellants.

Cripps Q.C. and *W. C. Ryde* were not heard.

EARL OF HALSBURY L.C. My Lords, I think, if one applies oneself to the particular matter and only to the particular matter which your Lordships have to decide in this appeal, the question, whether asked in a court of law or in the most popular assembly in the world, must come to this: Is a reservoir "land covered with water"? I think it is, and I have heard nothing which induces me to suppose that the Legislature used that phrase in any other or different sense from that in which I should understand it as one of the ordinary subjects of the Queen using his own mother tongue in the ordinary sense. This is "land covered with water"; and

(1) [1899] 1 Q. B. 273.

H. L. (E.) 1899 HAMPTON URBAN COUNCIL v. SOUTHWARK AND VAUXHALL WATER COMPANY. Earl of Halsbury L.C.

it seems to me that it would be a very extraordinary thing indeed if, after the use of this language in this sense, not for thirty-eight years only, but ever since the earlier period from which this phrase was derived, one was to find out some new and extraordinary mode of construing these words which would prevent its being what it is. It is land covered with water. And, my Lords, it is a remarkable thing that when it was put to the learned counsel more than once, "If a reservoir is not land covered with water, what is it?" I heard no other reply to that question than the statement that it is a reservoir.

It is manifest, my Lords, that what it is attempted to do here is to put into the language of the statute by construction words which are not there. The only other meaning alternative to that given to it by the Court of Appeal is that you must put into the statute by construction some such words as "land covered with water which is not made land covered with water by an artificial construction," or some words to that purport and effect. My Lords, what foundation there is for taking that liberty with the language of the Legislature and putting into the statute words which are not there I am wholly unable to understand.

I confess the thing that puzzles me most about this case is the doubts which appear to have been entertained by the two learned judges below—Wright and Darling JJ. I have not the least notion what they mean. To my mind the language of the statute is extremely clear, and is not susceptible of any other meaning than that which has been put upon it by the Court of Appeal. The one point which occurred to me as susceptible of doubt was the words which follow, and which Rigby L.J. has commented upon: "or used only as a canal or towing path." At first sight that would seem curious, no doubt. If "land covered with water" was enough, why should they have put in the word "canal" too? And if the words "towing path" had not been added, I should have thought it really was curious; but I think the explanation which has been given is quite satisfactory: the thing which was to be rated was the adventure—the whole construction; and if the Legislature had not put in these words, this question

upon the rating would have arisen: you have got to rate the canal itself—that is to say, that part of the earth on which the water rests at one rate, and the towing path, which is only ancillary to it and is only useful as making part of the artificial construction by which the adventure of the company is carried on, at a different rate. Therefore, for these very obvious reasons, the Legislature have not contented themselves by simply abiding by the phrase "land covered with water," but have added to it, "canal or towing path for the same."

My Lords, I am wholly unable to understand on what grounds we are asked to disturb or throw any doubt upon the construction of these words which has prevailed for a very considerable period. Speaking for myself, I must say that I should feel very great hesitation upon such a question in attempting to overrule the judgments of the learned judges in the cases which have been cited to us in the Court of Queen's Bench. (1) That was peculiarly the Court in which rating cases were decided, and very often decided under circumstances in which there was no appeal; so that in many cases the decisions there were final. And three of those learned judges were judges of very great eminence, and specially familiar with questions of rating.

My Lords, I desire to say no more. I think this case is abundantly clear. In my opinion your Lordships ought to dismiss the appeal with costs, and I move accordingly.

LORD MACNAGHTEN. My Lords, I entirely concur.

LORD ROBERTSON. My Lords, I think this is an extremely clear case, and I also concur in the judgment which has been moved.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, November 30, 1899.

Solicitors for appellants: *Kent & Son.*
Solicitors for respondents: *Lanfear, Tanner & Lanfear.*

(1) See [1899] 1 Q. B. at p. 279.

[HOUSE OF LORDS.]

H. L. (E.) 1899 Dec. 14.

THE RUABON STEAMSHIP COMPANY, LIMITED . . . . . } Appellants;

AND

THE LONDON ASSURANCE . . . Respondents.

Insurance, Marine—Ship Docked for Repair of Sea Damage—Ship Surveyed while in Dock for Lloyd's Classification—Apportionment of Dock Charges and Expenses—Contribution.

There is no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit from it.

During a voyage covered by a policy of marine insurance a vessel was damaged by a peril insured against and was therefore put into dry dock for the necessary repairs. The survey of the vessel for renewing her classification was not due, but the owners (without causing delay or increase of dock expenses) took advantage of her being in dry dock to have the survey made, and her classification was renewed:—

Held, that the expenses of getting the vessel into and out of the dock, as well as those incurred in the use of the dock, fell upon the underwriters alone, and could not be apportioned between them and the owners.

The decision of the Court of Appeal, [1898] 1 Q. B. 722, reversed.

The Vancouver Case (*Marine Insurance Co.* v. *China Transpacific Steamship Co.*), (1886) 11 App. Cas. 573, distinguished.

The *Ruabon*, belonging to the appellants and insured with various underwriters, including the respondents, while on a voyage suffered damage for which the underwriters were liable. She was taken into dry dock in Cardiff for the purpose of having the necessary average repairs effected. While she was in dry dock the appellants took advantage of the opportunity to have her surveyed by Lloyd's surveyor. About nine months had still to run before a survey was necessary in order that she might retain her classification, but by Lloyd's rules the owner was entitled to call for a survey at the time it was made. The surveyor certified that no re-classification repairs were necessary, and she retained her classification. An average statement was prepared shewing that the total amount due from the underwriters in respect of the repairs was 822*l.* 14*s.* 10*d.*, of which the amount due from the respondents was 82*l.* 5*s.* The

respondents contended that the expenses of taking the ship into dock and taking her out again, as well as those incurred in the use of the dock, ought to be divided between the owners and the underwriters and claimed to deduct 2*l.* 5*s.* on this account. They therefore paid the appellants 80*l.*, which sum was admitted to be enough if the respondents' contention was right. The appellants brought an action against the respondents for the disputed 2*l.* 5*s.* The action was tried before Mathew J. without a jury upon mutual admissions that Lloyd's survey was made as above stated, that docking was necessary for the vessel to pass Lloyd's survey, that items amounting to 55*l.* were necessarily incurred in connection with the docking, but that she did not go into dock for the purpose of Lloyd's survey, that no re-classification repairs were necessary, and that the time had not arrived at which it was necessary for her to pass Lloyd's survey.

Mathew J. gave judgment for the defendants on the authority of the *Vancouver Case* (1), and this decision was affirmed by the Court of Appeal (Chitty and Collins L.JJ., A. L. Smith L.J. dissenting. (2)) The plaintiffs brought the present appeal, which was argued first before the Earl of Halsbury L.C. and Lords Watson, Macnaghten and Morris.

March 20, 23. *Cohen Q.C.* and *Montague Lush* for the appellants. Apart from authority, a person is not bound to contribute to an expense because it happens to be to his advantage. The expenses incurred in taking the ship into and out of the dock, as well as those in using the dock, were incurred solely for the repair of the damage insured against, and ought therefore to fall wholly on the respondents. The contract of insurance is one of indemnity, and therefore the assured is not entitled to gain: there was in fact no gain to the appellants. The ship was taken into dock not for re-classification, but for the repair of sea damage. The *Vancouver Case* (1), which was relied on by the Courts below, was misunderstood. The question there was whether the particular average loss exceeded 3 per cent. There the ship was in dock

(1) 11 App. Cas. 573. (2) [1898] 1 Q. B. 722.

H. L. (E.) 1899 RUABON STEAMSHIP COMPANY v. LONDON ASSURANCE.

for the owners, not for the underwriters; but underwriters' repairs were effected, and it was found as a fact by the arbitrators that one-half should be attributed to each class of repairs: see Lord Herschell's judgment (1), which is in the appellants' favour. In that case both sets of repairs proceeded concurrently, and it was held that all the expenses should not fall upon the assured. There was no question of the cost of entrance into and exit from the dock; if the Court of Appeal's view here of the effect of the *Vancouver Case* (2) were correct, the owner and underwriter would have had to share the expenses of entering and leaving the dock. But there is no real analogy between the two cases. In the *Vancouver Case* (2) the underwriters' argument was that they were not liable for any part of the three days during which the owners and underwriters worked concurrently. But that reasoning did not prevail. In this case there was only one set of repairs. The appellants have not increased the underwriters' burden, and did not contract to bear any part of that burden. If the Court of Appeal were right the owner would be liable for merely looking at the vessel whether he does any repairing or not.

Joseph Walton Q.C. and *J. A. Hamilton* for the respondents. This is not, as has been ingeniously argued, a claim by underwriter against owner, but by owner against underwriter. The question is, what was the owners' actual loss? The charge for dry docking was equally necessary for survey and repairs, and ought to be attributed equally to owner and underwriter, both being benefited. The reasoning of Chitty and Collins L.JJ. is conclusive. There is no difference in principle between on the one hand putting into and taking out of dock and dock dues on the other. The case is covered by the *Vancouver Case* (2), in which Lord Herschell approved the view that where a ship is in dock for two purposes not interfering with each other, the expenses ought to be apportioned.

Cohen Q.C. in reply.

The House took time for consideration.

(1) 11 App. Cas. 587–9. (2) 11 App. Cas. 573.

Lord Watson died in the Long Vacation and the appeal was re-argued (Nov. 16) by one counsel of a side, *Cohen Q.C.* and *Joseph Walton Q.C.*

Dec. 14. EARL OF HALSBURY L.C. My Lords, the sum sought to be recovered in this case is a very small one, but the principle discussed and decided is one of very far-reaching importance, and I am unable to concur in the judgment of the majority of the Court of Appeal.

The agreed facts may be very shortly stated. The steamship *Ruabon* having been placed in dock for the purpose of repairs, for which the underwriters were liable, while she was in dock the owner took advantage of the opportunity to have the vessel surveyed. It is part of the agreed facts that the holding of the survey added not a farthing to the cost, or a moment to the period of time during which the execution of the repairs proceeded; and the question raised is whether the owner of the vessel is responsible on any reason known to the law to bear part of the expense involved in the docking of the vessel and keeping her there while the repairs were being executed.

My Lords, I notice that in more than one of the judgments it is said that the owner of the vessel used the dock for his own purposes. I think there is a fallacy in the employment of that word "used." He went on to his own vessel and held a survey, and I think it is not true to say that the dock was used for his purposes at all. He took advantage of the opportunity which was afforded to him by other persons (the insuring company) being under contract to do that themselves which gave him an opportunity of seeing the vessel, and which, if he had been minded to make a survey, he would have had to pay for himself. But unless the phrase "using of the dock" is explained, it seems to me to be fallacious, first, to say that he used the dock, and then to infer that as he used the dock he is called upon to pay for it.

My Lords, I propose to examine in detail the various cases, or rather the various classes of cases, where the right to contribution has been held to be part of our law. But it seems to me a very formidable proposition indeed to say that any Court

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has a right to enforce what may seem to them to be just, apart from common law or statute. The Courts no doubt will enforce the common law, and will apply it to new questions of fact which arise; but I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who has done it. Many cases might be put where the generality of such a proposition would be plainly contrary to any received principle, and to my mind the question now in debate—admitted to be absolutely novel—would not be covered by any principle known to the law, except such a general proposition as I have indicated above.

Now, I am unable to affirm that that is the condition of the common law. The doctrine of "average" has been repeatedly held to be a rule derived from the maritime law of Rhodes. In his judgment in *Strang* v. *Scott* (1) Lord Watson said: "The rule of contribution in cases of jettison has its origin in the maritime law of Rhodes, of which the text as preserved by Paulus (Dig. L. 14, tit. 2), is, 'Si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.'" Lord Bramwell, it is true, in *Wright* v. *Marwood* (2) rested it upon an implied contract inter se to contribute by those interested.

Lord Esher, on the other hand, in *Burton* v. *English* (3), spoke of it as a right arising not from any contract at all, but from the old Rhodian laws, which had been incorporated into the law of England as the law of the ocean.

It is not necessary to go minutely into the arguments arising from the difference of opinion as to the origin of the law. It is at all events a known principle enforceable by the Courts resting either upon positive enactment adopted into our law or from an implied contract between the parties. So Lord Coke in *Sir William Harbert's Case* (4) explains very clearly when dealing with "contribution." He says: "Note, reader, when it is said before and often in our books that if one purchaser be only

(1) (1889) 14 App. Cas. 607.
(2) (1881) 7 Q. B. D. 67.
(3) (1883) 12 Q. B. D. 220.
(4) (1584) 3 Rep. 14 *b*.

extended for the whole debt, that he shall have contribution; it is not thereby intended that the others shall give or allow to him anything by way of contribution, but it ought to be intended that the party, who is only extended for the whole, may by audita querela or scire facias, as the case requires, defeat the execution, and thereby he shall be restored to all the mean profits, and compel the conusee to sue execution of the whole land: so in this manner every one shall be contributory, hoc est, the land of every ter-tenant shall be equally extended."

Lord Redesdale in the case of *Stirling* v. *Forrester* (1) said that "the decision in *Dering* v. *Lord Winchelsea* (2) proceeded on a principle of law which must exist in all countries, that where several persons are debtors all shall be equal. The doctrine is illustrated in that case by the practice in questions of 'average,' &c., where there is no express contract, but equity distributes the loss equally. On the prisage of wines, it is immaterial whose wines are taken; all must contribute equally; so it is where goods are thrown overboard for the safety of the ship, the owners of the goods saved by that act must contribute proportionally to the loss. The duty of contribution extends to all persons who are within the scope of the equitable obligation."

My Lords, I know of no case in which anything like the present claim has been advanced. There is no debt here for which both the parties in question are bound to some third person.

It cannot be denied that the underwriters here were themselves bound to incur all the liability they did incur, and that the shipowner was under no such liability. There is here no joint ownership which makes a liability upon all partaking of that ownership, and which liability each is under an obligation to some third person to fulfil.

In another part of Lord Redesdale's observations in the case of *Stirling* v. *Forrester* (1) his Lordship makes clear what he means by his commentary on the case of *Dering* v. *Lord Winchelsea*. (2) He says: "The principle established in the case of *Dering* v. *Lord Winchelsea* (2) is universal that the right and duty of contribution is founded in doctrines of equity; it does

(1) (1821) 3 Bli. 575, 596; 22 R. R. 69.

(2) (1787) 1 Cox, 318; 2 B. & P. 270; 1 R. R. 41.

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not depend upon contract. If several persons are indebted and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of decision in *Dering* v. *Lord Winchelsea* (1), and in that case there was no evidence of contract as in this. So in the case of land descending to co-parceners, subject to a debt, if the creditor proceeds against one of the co-parceners, the others must contribute. If the creditor discharges one of the co-parceners, he cannot proceed for the whole debt against the others; at the most they are only bound to pay their proportions."

My Lords, in all the cases that I have referred to, and in all the observations made by the learned judges, the liability of each of the persons held to be bound to contribute is assumed to exist either by contract or by some obligation binding them all to equality of payment or sacrifice in respect of that common obligation. But this is the first time in which it has been sought to advance that principle where there is nothing in common between the two persons, except that one person has taken advantage of something that another person has done, there being no contract between them, there being no obligation by which each of them is bound, and the duty to contribute is alleged to arise only on some general principle of justice, that a man ought not to get an advantage unless he pays for it. So that if a man were to cut down a wood which obscured his neighbour's prospect and gave him a better view, he ought upon this principle to be compelled to contribute to cutting down the wood. Or if a man built a wall so as to shield his neighbour's house from undue wet or danger from violent tempests, he ought to be entitled to contribution because his neighbour has got an advantage from what he did.

(1) 1 Cox, 318; 2 B. & P. 270; 1 R. R. 41.

My Lords, I can find no authority for any principle which includes this case. The heads of "average," "principal and surety," "joint debtor," "or ownership of lands," all of which are liable in execution and only one of which has been made the subject of execution, are intelligible heads of the law and are included within well-known and ascertained principles. This case seems to me to go entirely beyond those ascertained principles, and to an extent for which it would appear there is no authority. No statute has authorized it; no principle of the common law comprehends it; and I am therefore unable to concur with the judgment of the majority of the Court of Appeal.

But it remains to consider whether the case is not covered by authority. That supposed authority is to be found in what has been called the *Vancouver Case*—the *Marine Insurance Co.* v. *China Transpacific Co.* (1) My Lords, I cannot think that that case establishes any such proposition as is insisted on here. In that case the sole question was whether a particular average loss sustained by the respondent exceeded 3 per cent. within the meaning of the warranty.

It is necessary to observe somewhat minutely the facts of that case, in order to see whether there is anything in it which affects the question now in debate. The *Vancouver*, the vessel in question, was insured in a time policy which contained the warranty "free from average under 3 per cent." During a voyage covered by the policy, she sustained certain damage not known at the time, but when, some time after, the owners, for their own purposes of cleaning and scraping her, put her into dock, the damage was observed then and there, and the underwriters were of course liable to make good the particular average loss for which under the policy they were liable.

The question having arisen in this form, and the owners having paid the whole of the dock dues while the vessel was being scraped and cleaned, and while simultaneously the obligation of the underwriters was being fulfilled by the repair of the damage, it was argued that the accidental circumstances

(1) 11 App. Cas. 573.

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of the owner having put his vessel into dock and the underwriter having thereby escaped any liability to the dock owner for dock dues, the cost of repairs to him was thereby brought under the agreed amount of 3 per cent.

What the Court had to determine was the liability under the policy in question, and with reference to that question, which, be it observed, is to be measured by what the damage would cost to repair, the Court held that the dock dues were part of the cost, and that, under the circumstances, as the operations were simultaneously performed, the cost should be attributed (let the phrases be noted) in moieties to the operations of those two persons interested. Now the owner paid the dock dues, and, if he had not done so, the underwriter would undoubtedly have had to pay for dock dues, and if he had, the amount paid would have been over 3 per cent. It came, in fact, to a calculation of the extent of the damage done, and, that being measured by its cost of repair, it was held that the 3 per cent. was reached. What Lord Herschell meant is, I think, sufficiently explained by what he says in commenting on the case of *Pitman* v. *Universal Marine Insurance Co.* (1) as to the mode in which the particular average loss was to be arrived at in that case. He says "all the judges were, I think, agreed that where there is a partial loss in consequence of injury to a vessel by perils insured against, he is entitled, as a general rule, to recover the sum properly expended in executing the necessary repairs, less the usual allowances."

Now, the facts found in that case relied on were that the vessel was put into dry dock on January 4, 1876. It was discovered on the afternoon of the same day that her sternpost was broken. It was found by the special case that if the vessel had required nothing but scraping and cleaning, the purpose for which alone she was put there by her owners, she might have been finished and discharged by the evening of the 6th, whereas for the purposes of her repair, for which the underwriters were responsible, she required the whole time from the 4th to the 11th of January, when in fact she was discharged.

(1) (1882) 9 Q. B. D. 192.

My Lords, how a mode of thus calculating the particular average loss so as to satisfy the contract between the two parties to it can justify such a proposition as is here insisted on, I am wholly unable either to understand or to agree to, and I think this judgment should be reversed, and I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, I concur. I agree with my noble and learned friend on the woolsack that there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it. Nor is there, I think, any authority to be found for the application of such a proposition unless it is to be found in the *Vancouver Case*. (1)

The *Vancouver Case* (1) has been supposed to go some way in that direction in a question between shipowner and underwriter, where ship's repairs and underwriter's repairs are carried out simultaneously. But it must be borne in mind that the question for decision in that case was "whether a particular average loss sustained by the respondents exceeded 3 per cent. within the meaning of the warranty contained in a policy of assurance underwritten by the appellants," and that (as Lord Herschell is careful to point out) was the sole question for decision. It was not decided that the shipowner was liable for one-half the cost of the use of the dock including docking charges, but that the underwriter in respect of his obligation was liable at least for one-half of the cost. That was enough in the particular case to give the victory to the shipowner, and in this House as respondent he could not have asked for more.

LORD MORRIS. My Lords, I agree both in the judgment proposed and in the reasons which have been assigned for it by the Lord Chancellor.

LORD DAVEY. My Lords, I have had an opportunity of reading the judgment about to be delivered by my noble and learned friend opposite (Lord Brampton), and, as that judgment

(1) 11 App. Cas. 573.

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expresses my own views better than I could express them myself, I will not trouble your Lordships by stating them.

LORD BRAMPTON. My Lords, I entirely concur in the judgment which has been delivered by the Lord Chancellor.

I take the general rule to be correctly stated by Lord Herschell in the *Vancouver Case* (1), that where there is a partial loss in consequence of injury to a vessel by perils insured against, and the ship is actually repaired by the ship-owner, he is entitled to recover the sum properly expended in executing the necessary repairs, less the usual allowances, as the measure of his loss.

I take it also as admitted that, but for the matter I am about to mention, it would not be disputed that the respondents were liable under their policy to pay, as an indemnity against the loss by perils of the sea which occurred, the full sum of 82*l.* 5*s.* claimed. This represents primâ facie their responsibility. The respondents seek to reduce this amount by the sum of 2*l.* 5*s.* by reason of a survey of the ship which the plaintiffs, the owners, caused to be made by Lloyd's surveyor, during the period the vessel was under repair on the pontoon, which, for this purpose, I may call a dry dock. If they are right in making a reduction on this account, no question being raised as to the amount, the respondents are entitled to retain the judgment pronounced in their favour by the majority of the Court of Appeal.

Since the decision of the *Vancouver Case* (1), by which, of course, we are bound, and which to me seems to be founded on good sense, it is not, in my opinion, open to question that where two operations are essentially necessary to be performed upon the hull of the ship in order to render her in a condition to justify a prudent owner in sending her again to sea—one of such operations being to effect repairs for the cost of which underwriters are responsible—the other to clean and scrape the ship necessitated by wear and tear, the cost of which must be borne by the owners themselves, and neither of such operations could be performed unless the ship were dry-docked, and both

(1) 11 App. Cas. 573.

of which operations the owners and underwriters, or owners acting for themselves and also for the underwriters, deem it expedient should be performed at one and the same time, or that one should immediately follow the other without any substantial interval under one continuous dry-docking: in such cases the cost of docking and all dock dues during the period the vessel is in dock must be shared in proportion, having regard to the period of joint or separate actual use of it.

I do not, however, find anything in the *Vancouver Case* (1) which would justify such division of dock dues, unless in such cases as I have mentioned. The present is a very different case. The *Ruabon* was dry-docked solely to enable the underwriters to effect the repairs for which they were liable and with no other object, and no other repair was, in fact, done or required to be done on the ship; the survey of Lloyd's surveyor was in no way necessary for any purpose connected with the work performed on the vessel, but was only made to entitle the owners to reclassification at Lloyd's and need not have been made at that moment, nor at any particular time, so long as it was made within the time limited by Lloyd's rules, which had then nine months to run. It is quite true that if it had not then been made it would have been necessary, if she were afterwards surveyed, to have incurred the expense of again dry-docking her at owner's expense; and to that extent the owners might have been benefited. I say might, because the owners might have sold the vessel in the meantime, or some other thing might have occurred to render such survey unnecessary. Assuming, however, that the expense of another dry-docking was in this way saved, and that to that extent the owners were benefited, I think that circumstance is immaterial, and does not warrant a claim for contribution towards the dock dues imperatively incurred on the underwriters' account in the discharge of their obligations. I think that such contribution can only be insisted upon in those cases where work is done to the vessel itself, by two or more persons, each separately and simultaneously engaged under different obligations in doing portions of it, dry-docking being necessary for each. If the

(1) 11 App. Cas. 573.

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respondents' claim for contribution was allowed, I see no reason why such a claim might not be made against an owner who while his ship was in dry dock sold her, subject to immediate inspection and survey by his purchaser. A variety of other cases similar in character might be suggested. I think the owners, in causing the survey to be made in this case, were taking what (1) Lord Herschell termed "an incidental advantage" "from the fact that a damage arising from a risk within the policy has necessitated repairs at the expense of the underwriter"; and he puts by way of illustration the case of a vessel in ordinary course requiring scraping and painting at intervals of five years, and before the time for such operation has arrived meeting with a disaster by perils of the sea and docked for repairs for which underwriters were responsible, and the shipowner taking the opportunity of scraping and painting his ship. In repudiating the notion that the entire expenses of the time occupied in that operation should be borne by the shipowner, he adds, "if they were to be borne by him at all." This observation of that noble and learned Lord makes it clear to me that he did not contemplate his judgment covering such a case as this, where nothing was in fact done on the ship and the survey did not in the smallest degree delay the completion or add one farthing to the expense of the repairs done for the underwriter. I think, therefore, that this appeal should be allowed.

LORD ROBERTSON. My Lords, sharing, as I do, the views which have been expressed as to the merits of the case before the House and as to the true limits of the *Vancouver* decision, I am for reversing the judgment appealed against.

Orders appealed from reversed and judgment entered for the appellants with costs here and below. (2)

Solicitors for appellants: *Botterell & Roche, for Vaughan & Roche, Cardiff.*

Solicitors for respondents: *Waltons, Johnson & Co.*

(1) 11 App. Cas. 588.

(2) The order was not drawn up when this report went to press.

[HOUSE OF LORDS.]

FOX . . . . . APPELLANT; H. L. (E.) 1899 Dec. 15.

AND

THE STAR NEWSPAPER COMPANY, LIMITED. . . . . RESPONDENTS.

Practice—Nonsuit—Discontinuance—Order XXVI., *rr.* 1–4.

A plaintiff cannot now elect to be nonsuited; if he offers no evidence at the trial the defendant is entitled to a verdict.

The decision of the Court of Appeal, [1898] 1 Q. B. 636, affirmed.

AT the trial of this action for libel before Lord Russell of Killowen C.J. and a special jury the plaintiff through his counsel elected to offer no evidence and claimed to be nonsuited. The Lord Chief Justice ruled that there must be a verdict for the defendants; the jury found a verdict accordingly and judgment was entered for the defendants.

An application to set aside the verdict and judgment was dismissed by the Court of Appeal (A. L. Smith, Chitty, and Collins L.JJ.) with costs. (1)

This appeal was brought by the plaintiff.

June 16, 19. The appellant in person was heard at length.

Blake Odgers Q.C., *Temple Franks*, and *Llewelyn Williams*, for the respondents, were not heard.

The House took time for consideration.

Dec. 15. EARL OF HALSBURY L.C. My Lords, this was an action for libel. After the jury had been sworn and the pleadings opened, the plaintiff claimed to be nonsuited; the Lord Chief Justice held that he was not entitled to be nonsuited, and directed a verdict for the defendants.

The sole question on this appeal is whether the old system by which a plaintiff at his own election could lose his writ, as it was said, and at his election bring another action for the

(1) [1898] 1 Q. B. 636.

H. L. (E.) 1899 Fox v. Star Newspaper Company. Earl of Halsbury L.C.

same cause, is still a system which exists in our law. I am very clearly of opinion that it does not.

Our whole system has been changed, and I think the reason why the word "nonsuit" itself is not now to be found in the rules is that it was determined that the power of a plaintiff at the common law to claim a nonsuit, or the plaintiff in equity to dismiss his bill at his own option, should no longer be permitted, and it is probable that the word "discontinuance" was supposed to apply to both forms of procedure both at common law and in equity. Accordingly by Order XXVI., r. 1, the only mode by which a plaintiff can submit to defeat is under that Order, unless he allows the proceedings to go on until the verdict is recorded against him.

The word "discontinuance" no doubt had, under a former system, the more limited application, and the old system of nonsuit is manifestly no longer capable of being reconciled with the new procedure either in form or substance. The substance is that when it once comes into court, and when the plaintiff offers no support to his action, there must be a verdict for the defendant. That is the course pursued by the Lord Chief Justice. I think it was entirely right, and I move your Lordships that this appeal be dismissed with costs.

Lords Macnaghten, Morris, and Shand concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, December 15, 1899.

Solicitor for appellant: *J. G. Lincoln.*
Solicitors for respondents: *Harrison & Davies.*

[HOUSE OF LORDS.]

CELESTINE DE NICOLS . . . . . APPELLANT; H. L. (E.)
1899
AND
CURLIER AND OTHERS . . . . . RESPONDENTS. Dec. 15.

Domicil—International Law—Marriage—Matrimonial Domicil—Movable Goods—French Law—Community of Goods.

A Frenchman and Frenchwoman married in France without any contract, so that according to French law their rights inter se as to property were subject to the law of community of goods. They came to England and were permanently domiciled there. The husband became a naturalized British subject, amassed a large fortune and died in England, leaving his wife surviving and having made an English will by which he disposed of all his property:—

Held, that as to movable goods the rights of the wife under the French marriage law as to community of goods were not affected by change of domicil, and that the widow was entitled to the share of her husband's personal estate to which she would have been entitled if they had remained domiciled in France.

The decision of the Court of Appeal, [1898] 2 Ch. 60, reversed and the decision of Kekewich J., [1898] 1 Ch. 403, restored.

Lashley v. *Hog*, (1804) 4 Paton, 581, distinguished.

THE appellant married De Nicols in France in 1854. Both were French and they married without any "contrat de mariage" or instrument in writing, so that by French law their rights as to property were governed by the rules of "communauté de biens." In 1863 they came to England with about 400*l*., and became permanently domiciled in London. In 1865 the husband became a naturalized British subject, and having amassed a large fortune at the Café Royal, Regent Street, died in 1897, having by an English will left his property to his executors upon certain trusts for the benefit of his wife and after her death of his daughter and her children, who were respondents.

The appellant having taken out an originating summons the question for decision was whether the change of domicil altered the legal position of the appellant and her husband in reference to property. It having been agreed to confine the

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argument for the present to the personal property, Kekewich J. made an order declaring that without prejudice to any question raised by the rest of the summons the change of domicil did not affect the respective rights of the spouses under the French or matrimonial domicil in and to the movable property acquired by them or either of them during their joint lives after such change. (1)

This decision was reversed by the Court of Appeal (Lindley M.R., Rigby and Collins L.JJ.). (2) The widow appealed.

June 23, 27; July 3, 10. *Graham Murray* (*Lord Advocate*) and *Westgate Q.C.* (*Renshaw Q.C.* and *Ingle Joyce* with them) for the appellant. Upon principle and reason the appeal presents little or no difficulty. It is admitted that if there had been an express ante-nuptial contract for community of goods the change of domicil would have made no change in the rights of property. Then why in the absence of an express contract should a contract be implied to change the rights? By French law the change of domicil did not dissolve the community or impair the wife's vested right. No such effect of a change of domicil was contemplated by the husband or the wife. It would not be just that a change of domicil which lies in the husband's sole power should deprive the wife of her rights. A change of domicil can at the most affect only the right of succession to the husband's property: it cannot touch the wife's right of property. In the present case no question of succession arises. Neglect of this distinction leads to confusion and error; as it did in *Lashley* v. *Hog*. (3) There the point was one of succession; it has no bearing on the present point. Lord Eldon's language and reasoning are at times inaccurate and confused; but so far as concerns the present point they are merely dicta. For the decision of this appeal the view taken by the French Courts of the French law is enough. [See Sirey's summary, cited in Lord Macnaghten's judgment.]

Dicey Q.C. and *Whinney* for the respondents other than the

(1) [1898] 1 Ch. 403. (2) [1898] 2 Ch. 60.
(3) 4 Paton, 581.

executors and trustees. It is true that if there had been an express contract before marriage for community of goods the respondents would have been in the wrong; but the absence of that contract makes all the difference. There is no room or reason for an implied contract that community shall prevail after a change of domicil. According to the principles of English law and of private international law as administered in the English courts the wife's rights in the unsettled movable property acquired during the coverture by the husband change with the change of domicil: *Lashley* v. *Hog* (1) is an authority for this; and the preponderating view of English and other authorities and text-writers is to the same effect. This is clearly the law as to immovables. Why should it not prevail as to movables? There is no reason why change of domicil should not alter rights of property as it undoubtedly does rights of succession.

E. J. Elgood and *F. J. Maugham* for the executors.

Graham Murray (*Lord Advocate*) in reply.

[The arguments and authorities (English, Scottish, American and Continental) upon private international law are clearly and fully set forth in the report below. (2) They need not be repeated here. The judgments in this House do not turn upon them or discuss them.]

The House took time for consideration.

Dec. 15. EARL OF HALSBURY L.C. My Lords, it is not necessary to state with great minuteness how the question in the present appeal arises. It is enough to say that two French subjects were married according to the laws of France on May 30, 1854. No marriage contract or instrument in writing was executed by either of the parties. The parties lived together, and in the year 1863 they came to England, and in the year 1865 the husband obtained the status of a naturalized British subject.

The whole dispute turns on the question whether the changed domicil and naturalization of the husband affected the wife's

(1) 4 Paton, 581.

(2) [1898] 2 Ch. 61–7.

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rights so as to give the husband the power to dispose of all the movable property by will instead of being restricted to the power of disposing of only one-half of it, as he undoubtedly would have been so restricted by the French law if the French law is decisive of the question.

The parties, as I have said, were married according to French law, and the first thing to do is to see how the matter would be dealt with in respect of such a marriage by the French law. There is no real conflict between the learned persons who have given evidence on this question. One of them indeed, besides giving evidence as to what the French law is, upon which he is an authority entitled to respect, has also gone on to express an opinion upon how that law should be treated in this country, upon which subject he is no authority at all; and indeed such a question is not the subject of evidence at all, but pure matter of English law for English Courts to decide.

The law of France as applicable to the matter now in debate is deposed to by M. Paul Lax, a Licentiate of Law in the University of France, an advocate who has practised in the Court of Appeal in Paris, and his evidence upon the subject is not really questioned by the gentlemen on the other side. M. Lax says: "2. According to the law of France and in particular arts. 1393 and 1401 of the Code Civil parties having intermarried without entering into a formal pre-nuptial contract are governed so far as their present and after-acquired property is concerned by the legal system of community of goods as defined by arts. 1401 to 1496 in Title V. of the same Code, which title is headed 'Du Contrat de mariage et des droits respectifs des époux.' 3. The husband and wife having so intermarried without entering into a pre-nuptial contract in writing are placed by the sole fact of the marriage and stand exactly in the same position in all respects as if previously to their marriage they had in due form executed a written contract and thereby adopted as special and expressed covenants all and every one of the provisions contained in arts. 1401 to 1496 above referred to. 4. Subject to the exceptions specified in the next following paragraph the community of goods includes (1.) all personal property belonging to the husband and wife at

the date of the marriage or having devolved upon either of them during coverture; (2.) all interest or income of whatever nature and source accrued or received during coverture; (3.) all real estate acquired during coverture (art. 1401 Code Civil). 5. Real estate possessed by either spouse at the time of the marriage or that may during coverture devolve upon him or her by way of inheritance gift inter vivos or will exclusive of real property acquired during coverture by any other means whatever does not become common property but remains the separate property of the spouse so possessing the same or upon whom the same has so devolved and any real estate is deemed to be common property unless it is clearly proved that either husband or wife possessed the same previous to the marriage or become entitled to it during coverture by way of inheritance, gift inter vivos, or will as aforesaid (arts. 1402 and 1404 Code Civil). 6. The administration of the common property belongs to the husband alone who may sell deal with and mortgage the same without the wife's concurrence (art. 1421 Code Civil). The common property real as well as personal stands or is invested in the name of the husband alone. 7. In the case of a legal community of goods any trade or business carried on either by the husband alone or by the husband and wife jointly is necessarily carried on for the account and benefit or at the risk of the community of goods. The whole assets of the said community, also the husband's separate real estate if any and the husband himself personally in infinitum are liable for the debts of such trade or business the wife not being liable for the same except to the extent of her share in the common property. The name of the husband alone appears in the firm or style of any trade or business carried on as aforesaid. 8. In case any real estate which remains the separate property of either spouse has been disposed of and the purchase consideration has not been reinvested in the name of the one to whom such real estate belonged but has been merged in the common property the spouse whose separate property the real estate so disposed of was is on the winding-up of the community of goods preferentially entitled to receive out of the common property the amount of the purchase consideration referred to (art. 1470 Code Civil).

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9. The community of goods when once constituted between husband and wife and whether created by an instrument in writing or by the operation of arts. 1393 and 1400 of the Code Civil cannot cease or be determined by mutual consent or by any cause or event whatever except the following that is to say: (1.) Decease; (2.) Divorce; (3.) Judicial Separation; (4.) Separation of estates decreed by a competent court of justice."

If this is the law by which the matter is to be governed, it cannot be denied that the appellant here must succeed, and it is a little difficult to understand upon what principle contracts and obligations already existing inter se should be affected by an act of one of the contracting parties over which the other party to the contract has no control whatever. And indeed, it is not denied that if, instead of the law creating these obligations upon the mere performance of the marriage, the parties had themselves by written instrument recited in terms the very contract the law makes for them, in that case the change of domicil could not have affected such written contract. I am wholly unable to understand why the mere putting into writing the very same contract which the law created between them without any writing at all should bar the husband from altering the contract relations between himself and his wife; when if the law creates that contract relation, then the husband is not barred from getting rid of the obligation which upon his marriage the law affixed to the transaction.

A written contract is after all only the evidence of what the parties have agreed to, and it would seem to be of no superior force as evidencing the agreement of the parties than a known consequence of entering into the married status. I not only do not understand, but I should decline to assent to any such view, unless I am compelled by authoritative decision or statute to adopt a view which to my mind is so entirely unreasonable. And it does not appear to me that any Court before whom this question has come would disagree with me as to its being unreasonable.

The Master of the Rolls himself says: "It is not altogether satisfactory to hold that a change of domicil cannot affect

an express contract embodying the law of the matrimonial domicil, but that a change of domicil does affect the application of that law if not embodied in an express contract."

My Lords, I should think that, in order to be binding on your Lordships, a previous decision must be in principle, and, as applicable to the same circumstances, identical; and it appears to me that the case by which the Master of the Rolls thought himself bound (*Lashley* v. *Hog* (1)) is quite distinguishable both in principle and in circumstances.

To omit other questions, the cardinal distinction between the French and the Scottish law is not, I think, without an important bearing upon the very question in debate, and I think it may be stated shortly thus: If the wife by the marriage in Scotland acquired no proprietary rights whatever, but only what is called a hope of a certain distribution upon the husband's death, it is intelligible that that right of distribution, or by whatever name it is called, should be dependent upon the husband's domicil, as following the ordinary rule that the law of a person's domicil regulates the succession of his movable property. But if by the marriage the wife acquires as part of that contract relation a real proprietary right, it would be quite unintelligible that the husband's act should dispose of what was not his; and herein, I think, is to be found the key to Lord Eldon's judgment. He says (2): "The true point seems to be this, whether there is anything irrational in saying that as the husband, during the whole of his life, has the absolute disposition over the property, that as to him, whom the policy of the law has given the direction of the family as to the place of its residence, that he who has therefore this species of command over his own actions, and over the actions *and property which is his own*, and which is to remain his own, or to become that of his family according to his will—why should it be thought an unreasonable thing, that, where there is no express contract, the implied contract shall be taken to be that the wife is to look to the law of the country where the husband dies for the right she is to enjoy in case the husband thinks proper to die intestate."

(1) 4 Paton, 581.

(2) 4 Paton, 617.

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It will be observed that the whole point of what Lord Eldon argues is that the whole of the property, apart from express contract, is absolutely and entirely the husband's, and that as by law he can dispose of it as he will, it is not unreasonable that he should be at liberty to do something which by its legal effect will change what I think are inaccurately described as the rights of the wife, but are accurately described as what would have been the rights of the wife if no change had taken place, because in substance she has until the husband's death no rights at all.

Doubtless it is true that, according to the authorities on Scottish law, the right of the wife is no right at all in its strict sense. When speaking of the jus mariti it is described as a legal assignation to the husband, and, in commenting on this authority, the late Mr. Fraser, while at the Scottish Bar, in his book on the Law of Husband and Wife, 2nd ed. vol. i. p. 677, says: "At a very early period of our law, the distinction between the two rights was recognised. The right of administration was regarded as being nothing more than its name imports—a right of administering the property of the spouses; while the jus mariti was something separate and superior, its purpose being to transfer the property from one spouse to the other. The distinction is settled and taken in a number of cases ranging from an early period to the present time, and has not been so clearly marked in some institutional works, solely from the desire of the writers to reconcile it with the notion of an absolute veritable communio" . . . . "The distinction is thus stated in argument in the Session Papers of *Gowan* v. *Pursell*: The jus mariti over the movables is a right during the existence of the marriage *of absolute property*. The husband may sell, or squander, or wastefully destroy the movables that fall under communion." How different the position of the wife is under the French law is sufficiently indicated, in contrast to the above extract, by s. 1443 of Code Civil, which enacts that: "1443. A separation of property can only be judicially sued for by the wife *whose dowry is in danger*, and when the disorder of the husband's affairs is such that there is reason to fear that his

property will not be sufficient to satisfy the *wife's rights and claims*. Any voluntary separation is void." And if the propositions are put shortly—that the wife acquires no proprietary rights by marriage under the Scotch law at all, but under the French law acquires a real proprietary right, the distinction between the two systems is evident enough. The communio bonorum in Scotland is a mere fiction. In France it is a reality, and in England, as the Master of the Rolls says, the parties to the litigation now being discussed, Mr. and Mrs. Hog, were both English, married in England, where her unsettled property, existing and after acquired, became the property of Mr. Hog by the mere fact of the marriage, and gave Mrs. Hog no proprietary right whatever to the movable property in question.

Once it is admitted that the marriage gives a proprietary right (and therein is the importance of the distinction Lord Eldon took between what was inaccurately argued in that case as a proprietary right conferred by the fact of marriage and a real proprietary right conferred by specific contract), the anomaly pointed out by the Master of the Rolls and sought to be explained becomes at once intelligible. It is only material as illustrating what was the prevailing train of thought in the minds of Lord Eldon and Lord Rosslyn. Both of them speak of the words "implied contract," by which I presume they mean implied from the relation of husband and wife, and not unnaturally they deduce the conclusion that if it is implied from that relation only the husband's change of domicil may bring with it the consequential change from such relation.

Here, however, as I have endeavoured to point out, the French marriage confers not only an implied but an actual binding partnership proprietary relation fixed by the law upon the persons of the spouses, the binding nature of which, it appears to me, no act of either of the parties contracting marriage can affect or qualify.

I can only account for the absolutely inaccurate use of the Scottish term jus relictæ as arising from a reference to a dispute that appears to have existed in the Scottish authors as

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to whether those rights flowed from the communion, whereas, to quote again from Mr. Fraser's book, p. 671, where he says: "It has been found in accordance with the opinions of the French commentators, of Dirleton, and other lawyers of our own country, that the jus relictæ and legitim are in all respects the same, that they are mere casual contingent rights during the subsistence of the marriage, existing then *only in hope*, and coming into proper rights *merely at its dissolution*, that they are *not rights of division of a fund already held in common*, but rights of *debt* against the husband's executors, constituting the widow and the children creditors, whose right comes into being by the husband's death, and secondary creditors too, for all other debts must be paid before theirs."

It is, therefore, as I understand, that when once Lord Eldon came to the conclusion that the husband and wife had become Scottish domiciled spouses, the property not affected by a previous complete and irrevocable right would properly be distributed according to Scottish law.

It follows, therefore, if I am right, that that case is not binding on your Lordships, and that we are at liberty to decide the question now in dispute in accordance with reason and common sense.

I therefore move your Lordships that the order appealed from be reversed, and that in respect of costs, as I understand this is only one question in the summons which comprehends other questions also in debate, the costs of this appeal should be costs in the summons.

LORD MACNAGHTEN. My Lords, in 1854 Mr. De Nicols, the testator, and the appellant, who is now his widow, intermarried in Paris. They were both French by birth and both domiciled at the time in France. They married without a contract of marriage, and consequently under the law of France they became subject to the system of community of goods.

In 1863 Mr. and Mrs. De Nicols left Paris and came to London. They acquired an English domicil, and in 1865 Mr. De Nicols obtained a certificate of naturalization in this country. From that time forward their residence in England

was continuous. Mr. De Nicols became a restaurant proprietor in London. He was successful in business, and amassed a large fortune consisting of both movable and immovable property.

Mr. De Nicols died in February, 1897, having made a will in the English form and language.

The question for your Lordships' consideration is whether Mr. and Mrs. De Nicols continued subject to the system of community of goods after they became domiciled in England. On the one hand it is contended that the change of domicil from French to English destroyed the community altogether, and, therefore, that the testator's will operated upon the whole of the property vested in him which, but for that change, would have been common. On the other hand it is said that the community continued notwithstanding the change of domicil, and that Mr. De Nicols remained bound by the article of the Code Civil, which provides that a testamentary donation by the husband cannot exceed his share of the community.

If the case were not embarrassed by the judgment of this House in *Lashley* v. *Hog* (1), which was discussed so fully at the bar, it would not, I think, present much difficulty.

Putting aside *Lashley* v. *Hog* (1) for the moment, the only question would seem to be what was the effect according to French law of the marriage of Mr. and Mrs. De Nicols without a marriage contract? Upon that point there cannot, I think, be any room for doubt. It is proved by the evidence of M. Lax, the expert in French law called on behalf of the appellant, that, according to the law of France, a husband and wife intermarrying without having entered into an ante-nuptial contract in writing are placed and stand by the sole fact of the marriage precisely in the same position in all respects as if previously to their marriage they had in due form executed a written contract, and thereby adopted as special and express covenants all and every one of the provisions contained in arts. 1401 to 1496 in Title V. of the Code Civil, headed "Of Marriage Contracts and the respective rights of spouses."

In support of this conclusion, M. Lax refers to the relevant

(1) 4 Paton, 581.

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articles of the Code and to a decision of the highest authority pronounced by the Cour de Cassation in January, 1854. The case as reported by Sirey presents the argument so clearly and so concisely that I may be pardoned for referring to it more in detail. The summary in Sirey's Reports is as follows:— "(Tables Générales [Contrat de Mariage] paragraphe 8.)" "The conjugal association as to property once formed at the time of the marriage by the operation of the law of the domicil or nationality of the husband cannot be altered later on either by a change of nationality or by the acquisition of a new personal domicil subsequently to the marriage." The case was this: An Englishman and an Englishwoman, a Mr. and Mrs. Boyer, were married in England without any settlement. Afterwards they went to France and jointly acquired immovable property there. The husband became a French citizen. The wife died first. On her death duty was demanded and paid on one-half of the property as having devolved upon her children as her next of kin. An action was brought for the return of the duty. The tribunal of Lille ordered repayment, holding that "the matrimonial compact in respect of property is as immutable as the marriage itself, of which it is an accessory." The revenue authorities appealed. The Cour de Cassation affirmed the decision. They founded their judgment upon their view of English law, which seems right enough, and upon the following considerations—that "the rule of the marriage of the spouses Boyer has followed them to France when they went there to settle and there acquired property," and that "the said rule has the same force as if a formal contract had been entered into between the said spouses for the regulation of their fortune."

Although this reasoning may not seem quite in accordance with the opinion which Lord Eldon expressed in *Lashley* v. *Hog* (1) as to the effect of an English marriage without a settlement, it indicates, I think, the view which, according to French law, would be taken of the compact as to property constituted by a French marriage under the Code Civil without an ante-nuptial agreement.

(1) 4 Paton, 581.

The expert who was called on behalf of the executors does not attempt to contravene this conclusion of law. He endeavours to minimise its effect by treating it as a self-evident proposition —as in fact being nothing more than what the Code declares. He adds, however, that in his opinion the effect of a change of domicil or nationality upon the community system was never considered by the framers of the Code. That may be so. But if there is a valid compact between spouses as to their property, whether it be constituted by the law of the land or by convention between the parties, it is difficult to see how that compact can be nullified or blotted out merely by a change of domicil. Why should the obligations of the marriage law, under which the parties contracted matrimony, equivalent according to the law of the country where the marriage was celebrated to an express contract, lose their force and effect when the parties become domiciled in another country? As M. Lax points out, change of domicil and naturalization in a foreign country are not among the events specified in the Code as having the effect of dissolving or determining the community. Let us suppose a case the converse of the present one. Suppose an Englishman and an Englishwoman, having married in England without a settlement, go to France and become domiciled there. Suppose that at the time of the acquisition of the French domicil the husband has 10,000*l.* of his own. Why should his ownership of that sum be impaired or qualified because he settles in France? There is nothing to be found in French law, nothing in the Code Civil, to effect this alteration in his rights. Community of goods in France is constituted by a marriage in France according to French law, not by married people coming to France and settling there. And the community must commence from the day of the marriage. It cannot commence from any other time. It appears to me, therefore, that the proposition for which the executors contend cannot be supported on principle. That, I think, was the view of the Court of Appeal. But they considered that the judgment of Lord Eldon in *Lashley* v. *Hog* (1) compelled them to decide in favour of the executors. Mr. and Mrs. Roger Hog, an

(1) 4 Paton, 581.

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Englishman by domicil and an Englishwoman, intermarried in England without a settlement. Mr. Hog made a fortune in England, settled in Scotland and became domiciled there. After this change of domicil the wife died in the lifetime of the husband. Some years later the husband died a domiciled Scotsman. There was a good deal of litigation as to the administration of Mr. Hog's estate, and there were appeals to this House. In one of these appeals, among other things, this House determined that Mrs. Lashley, who was one of the children of the marriage, had "a claim in right of her mother the wife of the said Mr. Roger Hog, who at the time of her death had his domicil in Scotland, to a share of the movable estate of her father at the time of her mother's death."

No doubt if the law had not been altered by the Act 18 Vict. c. 23, s. 6, that decision would be binding upon this House in a similar case. But when you are asked to apply the decision to a case where the circumstances are different, it seems to me that the proper course is to ascertain, if you can, the principle of the decision, and then to see if that principle is applicable to the circumstances of the case under consideration. This is the case of a French marriage with a settlement prescribed and constituted by the law of the land and followed by naturalization in a foreign country. *Lashley* v. *Hog* (1) was the case of an English marriage without a settlement and a change of residence to another part of the United Kingdom.

Now, what was the principle on which Lord Eldon proceeded? After a long discussion Lord Eldon comes to the point by asking this question: "Why should it be thought an unreasonable thing that where there is no express contract the implied contract should be taken to be that the wife is to look to the law of the country where the husband dies for the right she is to enjoy, in case the husband thinks proper to die intestate?" Then his Lordship goes on to say (2): "This has been the principle, which it seems to me has been adopted, as far as we can collect what has been the principle adopted, in cases in those parts of the island with which we are best acquainted, and not being aware that there

(1) 4 Paton, 581. (2) 4 Paton, 617.

has been any decision which will countervail this; thinking that it squares infinitely better with those principles upon which your Lordships have already decided in this case, it does appear to me attending to the different sentiments to be found in the text-writers upon the subject that it is more consonant to our own laws, and more consonant to the general principle, to say that the implied contract is that the rights of the wife shall shift with the change of residence of the wife, that change of residence being accomplished by the will of the husband whom by the marriage contract in this instance she is bound to obey."

I may observe in passing that in that passage Lord Eldon was referring to the difference of practice in the administration of intestates' effects then prevailing in the different provinces of York and Canterbury, and also to a previous decision in the case of *Lashley* v. *Hog* (1) on the question of legitim. It is not, I think, very easy to see how the principle which Lord Eldon selects as the ground of his decision could in the case of an English marriage and the subsequent acquisition of a Scotch domicil be legitimately extended so as to deprive the husband of his own property, and transfer it in his lifetime to the next of kin of his wife. It seems to me that the result can only be reached by one or other of two alternatives. Either it must be held that the implied contract on the part of the husband is that in case of a change of domicil the wife shall enjoy all the rights of a woman married in the country where the new domicil is established, and that he will surrender in her favour so much of his rights as may be inconsistent therewith; or else it must be assumed that marriage in Scotland is not required to create communion of goods, but that communion of goods is incidental to the status of married persons in Scotland; or, as Lord Eldon puts it, "the law of Scotland 'recognises' communion of goods 'in the married state.'"

Now, if that assumption be necessary in order to support Lord Eldon's conclusion in *Lashley* v. *Hog* (1), it is obvious that there is so wide a divergence between the law of Scotland, or

(1) 4 Paton, 581.

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what is assumed to be the law of Scotland, and the law of France as to make the decision inapplicable to the present case. If, on the other hand, Lord Eldon's conclusion is a legitimate extension or development of the principle on which his argument is founded, it seems to me that there is no room for the application of the principle in the circumstances of the present case. The principle, as Lord Eldon explains, is founded on the notion that upon an English marriage without an express settlement there is an implied contract that the expectations of the wife are to depend upon the domicil of the husband. Lord Eldon admits, and it was conceded at the bar, that, if there had been a written contract dealing with the whole property of the spouses present and future, the principle of *Lashley* v. *Hog* (1) could not apply. Now the effect of what took place on the occasion of the French marriage, so far as it amounted to a compact in respect of property, must, I think, be determined by French law; and it has been proved by the evidence in this case that what did take place was to all intents and purposes, according to the law of France, equivalent to a written contract.

It appears to me, therefore, that the case is not governed by the decision in *Lashley* v. *Hog* (1), and I think the appeal ought to be allowed.

LORD MORRIS. My Lords, I agree in the judgment proposed by the Lord Chancellor, and in the reasons assigned for it.

LORD SHAND. My Lords, it is clear from the judgment of the Court of Appeal delivered by the learned Master of the Rolls that their Lordships' opinion apart from the effect of the case of *Lashley* v. *Hog* (1) was favourable to the appellant on the ground that when her marriage took place in France, in the absence of any written contract, the provisions of the Code Civil of 1804, and particularly the provisions immediately succeeding s. 1400, established the system of community between the spouses, under which the right to one-half of the joint

(1) 4 Paton, 581.

estate of the spouses as defined in these sections became vested in the appellant, and was not lost by the change of domicil.

The difficulty which weighed with their Lordships arose entirely from the judgment of this House in the case of *Lashley* v. *Hog*. (1) With much deference to their Lordships, I agree in what I understand is the unanimous opinion of your Lordships in this House, that the present case is clearly distinguishable from the case with which Lord Eldon was there dealing, and, having had an opportunity of seeing the judgments of my noble and learned friends the Lord Chancellor and Lord Macnaghten, I shall content myself with stating shortly wherein I think the distinction consists.

It cannot be disputed that if at the time of the marriage the appellant and her late husband had executed a marriage contract by which the appellant had stipulated for precisely the same advantages as the Code, in default of any contract, expressly gave her, a change of domicil of the spouses thereafter would not have defeated the appellant's contract right to the estate which she now claims. Lord Eldon indeed in his judgment in the case of *Lashley* v. *Hog* (1) appears to have made this quite clear. It seems to be beyond question that in entering into the onerous contract of marriage the appellant would have acquired an indefeasible right to the advantages for which she there stipulated, notwithstanding a subsequent change in the domicil of the spouses, unless indeed she had thereby agreed that in the event of such a change her rights should be varied. In my opinion, though a written contract was not entered into, the parties in respect of the special provisions of the Code were, on the completion of their marriage, substantially and for all legal purposes in the same position as if they had made their contract in writing. It must be presumed that they knew the provisions which the Code contained, and it seems difficult to suggest any possible reason which could induce them to make a contract in writing merely expressly to repeat or adopt the detailed provisions of the Code, when the Code itself had provided that in default of any written contract these provisions should take effect. The

(1) 4 Paton, 581.

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only ground which it appears to me could be suggested is that according to the argument of the respondents such a question as the present could not in that case have been raised; but in my opinion, as the Code which is virtually statute law enacted expressly all that a written contract required to provide, this argument of the respondents fails. On this subject I refer to the evidence of the legal expert, M. Paul Lax, in art. 3 of his affidavit, which so strongly accords with the view I have now stated. His evidence is to the effect that the parties having intermarried without a written contract were placed by the sole fact of the marriage "in the same position in all respects" as if previously to their marriage they had in due form executed a written contract and thereby adopted as special and expressed covenants all and every one of the provisions contained in arts. 1401 to 1496 of the Code, and I do not find in the evidence of M. Astoul, examined for the respondents, any substantial disagreement with this view.

The case being thus clearly distinguishable from that of *Lashley* v. *Hog* (1), I have only to add that I agree with the views now stated by the Lord Chancellor as to the grounds of the judgment in that case.

LORD BRAMPTON. My Lords, in the year 1854 the plaintiff Mrs. De Nicols and her now deceased husband, both being natives of France, domiciled there from their birth and of full age, were duly married according to the law of that country at the mayor's office in Paris under the system of community of goods contained in the Code Civil.

They remained so domiciled until the year 1863, when they came to reside in, and changed their domicil to, England; and in this country they remained until the husband's death in 1897, the plaintiff, his widow, still continuing her residence here.

By means of such little capital as they were possessed of when they arrived in London, and their own united personal intelligence and industry, they accumulated in England a large fortune, consisting of both movable and immovable property.

(1) 4 Paton, 581.

To-day we are only concerned to deal with that which was movable.

At the time of his death the husband was in ostensible possession of the whole of the joint property: having in March, 1895, made his will purporting to dispose of every part of it as if it were all his own absolutely. The plaintiff alleges that he was not justified in doing so, claiming that as his surviving spouse she became on his death entitled, under art. 1474 of the system of community, to one-half share of his then available assets. The law of France relating to marriage contracts, and the rights of spouses, is contained in Title V. of the Code Civil, passed and promulgated in February 1804, chapters 1, 2, and 3, comprising arts. 1387 to 1494 inclusive.

From the general provisions contained in chapter 1, I gather that one great object of the Legislature was to ensure, as far as possible, that, contemporaneously with every celebration of marriage in France, some definite and binding regulation or settlement of the property of the spouses respectively shall be brought into operative existence, leaving it however absolutely and without restriction open to the spouses mutually to determine and agree what shall be the character, substance and provisions of such regulation, provided only that it shall not be contrary to morality, and shall not derogate from certain marital and other rights in no way affecting this present case.

Another object was to provide as much facility as possible for ready, easy and inexpensive obedience to this requirement by those who are disposed to accept such aid. With a view to these ends, in chapters 2 and 3, the Code sets out in minute detail for the consideration and for the adoption, if they please, of those contemplating marriage, two systems—one called the system of community, for the regulation of all their movables both present and future during the whole period of their coverture, the other, the "dotal system," to which I need not further refer.

In the event of the intending spouses not being willing that their properties shall be regulated by the system of community, art. 1387 provides that they may make a special agreement for themselves as they may deem proper; such special agreement,

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as a "matrimonial agreement," is by art. 1394 required to be reduced into writing and executed before a notary prior to the celebration of the marriage. The reason for this requirement is very obvious. The system, which was framed with a view to embody such a regulation or settlement as would be acceptable and best adapted to the requirements of the great majority of French intending spouses, had already been carefully prepared and set forth in detail in the Code, so that it can easily be understood and readily and inexpensively adopted; but no draftsman, however skilful and ingenious, could possibly devise and frame by anticipation a form of settlement to meet the variety of views and caprices of those who preferred to make their own settlement; such could only be prepared when the wishes and intentions of the parties were made known to those whose duty it might be to prepare the instrument in each particular case.

A moment's consideration will suffice to shew how absolute and unlimited is the freedom in choice of a settlement to spouses who desire to exercise it, and how erroneous it is to suppose that any particular regulation of their property is forced upon them against their will.

It will be convenient to bear in mind the general features of this system; I have therefore thought it may be useful at once to set out a short epitome of the most important articles.

It is contained in chapter 2 of the Code, and in s. 2 is described as a "conjugal partnership," an expression strongly savouring of contractual relations.

By art. 1401, the property to be administered under it, described as "community assets," is composed (inter alia) of all the movable property of which the spouses are possessed at the time of the celebration of the marriage, together with all the movable property which comes to them during coverture. By art. 1409 the liabilities include the personal debts of the spouses owing at the time of the marriage, the debts incurred by the husband during the community, or by the wife with his assent, the household expenses of the spouses, and the maintenance and education of their children.

The husband is constituted the sole administrator of the

assets, and considerable powers of disposition are conferred upon him; but he cannot by a testamentary donation exceed his share (art. 1421, art. 1422, art. 1424).

Art. 1441 provides for the dissolution of the community by the death of either of the spouses and in several other events immaterial to the consideration of the present question.

On the dissolution of the community by the death of one of the spouses, after all legitimate claims upon the assets have been satisfied, the surplus is to be divided by halves between the surviving spouse and those who represent the deceased (art. 1474).

Art. 1400 declares that this system is established by the simple declaration that the parties marry under it or in default of a contract, meaning, of course, such an agreement as is contemplated in arts. 1387 and 1393.

I pause here to emphasise the fact that this system operates upon no spouses unless by their mutual assent.

It was under this system, which had been for nearly half a century a very familiar and approved form of settlement, of the nature and provisions of which the parties as French subjects must be presumed to have had knowledge, they were married, and upon the faith and under the belief that its provisions would regulate the property of both so long as their married life continued, and that on the death of either it would be divided between the survivor and the representatives of the deceased, the wife placed in the possession of her husband as part of the capital of their "conjugal partnership" such little property as she could then call her own; and from that time until the death of her husband it was never suggested that with the change of domicil to England the rights of property the wife had acquired by her marriage in France vested in her husband as absolute owner, as if they had been married in England without any settlement at all.

The Married Women's Property Acts do not, in my opinion, affect the present case.

The case of *Lashley* v. *Hog* (1) has all along been relied upon by the defendants as decisive in their favour. Kekewich J.

(1) 4 Paton, 581.

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thought that authority inapplicable, and gave judgment against them. The Court of Appeal, however, adopted the defendants' view, and reversed his judgment.

I have the misfortune to differ from the Court of Appeal, it appearing to me that the two cases are distinguishable in very material particulars, and that no part of Lord Eldon's observations in delivering the judgment of the House of Lords can be said to determine this matter. In order to make these distinctions apparent, I propose briefly to recapitulate the material facts of that case.

Roger Hog was a native of Scotland, he came to England to better his fortune, and in 1737, being then domiciled there, married Rachael Missing, an English lady. No settlement affecting this case was made on their marriage, but with his wife Mr. Hog received 1000*l.*, which, according to the law of England, became his sole absolute property, upon the principle that in England a wife can by the common law have no separate legal existence.

They remained resident in England until 1752, when they removed to Scotland, where undoubtedly they became domiciled before 1760, when their coverture was dissolved by the death of the wife. The husband survived until 1789, when he also died, still domiciled in Scotland, possessed of considerable personal property. After his death Mrs. Lashley, who was a daughter of the marriage, as representing the right of her deceased mother, made claim in the Scottish Courts upon her father's estate to a share of the personal property which, as she alleged, her father held in community, according to the then law of Scotland, at the dissolution of the coverture. For Mrs. Lashley it was contended that the Scottish law of community of goods attached itself upon the property of Mr. Hog on his becoming domiciled in Scotland, notwithstanding the fact of his marriage to her mother in England without any settlement many years before. This absence of a settlement is a very important feature in that case, which, it is contended for the plaintiff, is absent from the one now before us.

The judgment of the House of Lords was in Mrs. Lashley's favour. Lord Eldon in delivering it had to deal also with a

variety of other questions, which necessitated a lengthy and complicated discussion; but so far as regarded the matter now before us it is, to my mind, clear, intelligible and convincing. He held, first, that the Scottish law of community attached itself upon all the personal property of which Mr. Hog was or thereafter might become possessed during his domicil in Scotland; and, secondly, that on the death of Mr. Hog the distribution of his personal estate, including the share of the predeceased wife, which up to that event had not been severed, must be regulated by the succession law of Scotland, where his death occurred. As regards the first of these rulings, it had been contended for those who opposed Mrs. Lashley's claim (1), first, that in the absence of a written contract the rights of husband and wife must be regulated by the law of the country where they were domiciled at the time of the marriage; and, secondly, that there was on the marriage an implied contract between the spouses that they would be bound to all those conditions and consequences which the law of the country made to follow upon their consent to the marriage itself, and that no change of domicil could alter this matrimonial law or implied matrimonial contract.

Both these contentions were overruled for reasons stated at length in the judgment. (2) The complete absence of any settlement affecting the property was evidently the basis of the decision. The law of England made none; it merely gave to the husband all his wife's property, placing upon him no restrictions. When, therefore, he thought fit to change his domicil to Scotland he took with him, as it were, all his movable property absolutely free and unfettered. The law of communio bonorum would clearly have attached to it if his marriage had been celebrated in that country; but that law became equally attached upon spouses who "in the married state" became there domiciled, at least for so long as that domicil continued, which, in the case of Mr. and Mrs. Hog, was continuously until they were both dead. (3) In the teeth of these circumstances it is difficult to suggest to oneself how

(1) 4 Paton, 599.

(2) 4 Paton, 606, 610 et seq.

(3) 4 Paton, 611.

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the judgment could have been other than it was. There is nothing in *Lashley* v. *Hog* (1) which seems to me to affect this case; but I have dealt with it at some length because it has been so much relied on against Mrs. De Nicols' claim. Of course the grave distinction between that case and this is to be found in the fact that there the change of domicil was from a country in which neither the law nor the parties had made any settlement to one in which there was in some sort a settlement by the law in the shape of the community of goods. In this case the change was from a country where the most elaborate and binding settlement by the law of France and by contract, as contended, was made, on and by marriage, to a country (England) the law of which makes no settlement at all, but ignores the separate legal existence of the wife altogether. In every civilised country marriage is treated as a contract of grave importance. It is the voluntary union for life of the parties to it. It is created by the bare ceremony of marriage according to the form prescribed by the law of the country in which it is celebrated. It involves incidentally an agreement that the spouses will mutually respect and fulfil those marital rights and obligations which are imposed upon them by that law, as incidents inseparable from their matrimonial union. Among such incidents of a marriage under the law of France is the establishment, or bringing into active operation, of some regulation of their personal property. One mode of accomplishing this is the establishment, by one and the same ceremony which makes them man and wife, of the system of community which could not be attached upon their property without the mutual consent of the spouses—that is to say, by marrying under it: which must be testified either by a declaration of the spouses, or by their omission to make a special written agreement. But once established, the system becomes the regulation or settlement of their choice, and the expression of their mutual intention to be bound by its provisions, creating mutual legal rights and obligations binding upon each, throughout their married lives. In the present case, if credit is to be given to the fourth paragraph of Mrs. De Nicols' affidavit,

(1) 4 Paton, 581.

their so marrying was the result of a previous provisional agreement between them that it should be so.

It is true this last-mentioned agreement could not, standing alone, be relied on as proof of the contract now sought to be incorporated in the marriage contract, for this simple reason —it was a mere executory agreement which had of itself no effect in establishing the system; that could only be effected by the actual celebration of the marriage. It was, nevertheless, valuable as evidence, if evidence were needed, that the spouses knew (apart from the ordinary presumption of knowledge of the law of their own country) what were the legal obligations towards each other they were about to contract respecting their property, and that they voluntarily undertook them with a knowledge that they would and a common intention that they should be binding upon them so long as they both lived.

No set form of words was necessary, nor was any writing required by the law of France; for I take it to be clear that the "matrimonial agreements" mentioned in art. 1394 have reference only to the special agreements mentioned in art. 1387 and described in art. 1393 as "derogating from" or "modifying" the system of community.

In these voluntary and mutual intentions and acts are to be found all the essential elements of a legal contract, rendered so complete and obligatory by the law of France that nothing could in that country annul or give it greater force.

It is conceded that had the provisions of the system been embodied in the very words of the Code in an instrument signed by the parties expressing their intention to marry under it, it would be unobjectionable and as valid in an English court as a special agreement of the parties made under art. 1387. This may at least be taken as an admission that there is nothing in the system itself repugnant to the law of England, and this reduces the objection to one merely of form. What, then, is the weight of this objection, if all required by the law of France has been observed? I have always been under the impression that the form required for a contract by the law of the place where it is made is both sufficient and

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requisite for its validity in England. In this case every form required by the Code Civil has been complied with, and I see nothing to prevent the operation of the rule that, where there is a marriage contract or settlement, the terms of such contract or settlement determine the rights of husband and wife in respect of all movables to which it applies. As a rule, the rights of spouses conferred by the law of one country change with every change of domicil, for the law of one country can have no intrinsic force, except within the territorial limits and jurisdiction of that country. But the comity of nations, with a view to the comfort and convenience of their respective subjects, has rightly conceded that there should be some exceptions to this strict rule of the territorial law. By one of such exceptions it is universally admitted that where, upon marriage, a marriage contract or settlement is made regulating the property of the spouses, such contract or settlement shall have effect given to its provisions wherever the spouses may afterwards be domiciled.

When *Lashley* v. *Hog* (1) was decided in July, 1804, the Code Civil had only been promulgated about five months: this may account for no mention having been made of it. What might have been held had the question then arisen in an English court, as to how far it should be allowed to operate under circumstances similar to those before us, I cannot of course say, for in itself it was an untried novelty. It seems strange that no such question has been raised and decided in an English court hitherto. In dealing with it to-day we have the benefit of nearly a century's experience before us of the cheerful and ready submission to and approval of this system and enactment so admirably calculated to satisfy the requirements of French spouses by millions of the subjects of a great and powerful country. I am sanguine enough under such circumstances to entertain a hope that your Lordships will, in declaring the law of this land, think it right to accord to this system and enactment a place with contracts and settlements as exceptions to the rule of territorial law—even apart from the question of contract, which I have discussed—and carry

(1) 4 Paton, 581.

out the real wishes and advance the interests of the many subjects of France whose properties in their own country are, and in the future will be, regulated by it.

Thinking, as I do, that this case falls within the exceptions engrafted by the comity of nations upon the strict rule of the territorial law (Robertson, pp. 74–77), I am of opinion that the judgment of the Court of Appeal should be reversed and that of Kekewich J. restored, and that judgment should be entered for the plaintiff with costs.

Order appealed from reversed and order of Kekewich J. restored: costs here and below to be costs in the summons. (1)

Solicitors for appellants: *Hicks, Arnold & Mozley.*
Solicitors for respondents: *Tyrrell Lewis, Lewis & Broadbent.*

(1) The order was not drawn up when this report went to press.

[HOUSE OF LORDS.]

H. L. (Sc.) 1899 July 31.

THE LORD ADVOCATE . . . . . APPELLANT;

AND

WEMYSS AND ANOTHER . . . . . RESPONDENTS.

ORIGINAL AND CROSS APPEALS.

Minerals—Coal below Low Water-mark—Barony Title.

The doctrine of possession by prescriptive working of minerals applicable to the foreshore ex adverso of a barony, granted with parts and pertinents, cannot be extended to a barony granted with power to work minerals infra fluxum maris, because these words shew that the grant is limited to the minerals under the foreshore only. Nor can such prescriptive use be extended to a third barony where a barony with a bounding charter lies between.

Quære, whether the doctrine can be extended to cover minerals running from the foreshore under the sea-bed.

Adoption—Minor—Lease of Coal.

The right of a proprietor of estates adjoining the sea to work the coal below low water-mark was challenged by the Crown during the proprietor's minority. The estates to which the minor had succeeded consisted in part of entailed and in part of unentailed lands. The administration of the unentailed lands was vested in the testamentary trustees of the minor's father, who were also curators of the minor. These trustees, without the concurrence of the minor, entered into a transaction with the Crown whereby they on their part accepted a lease of the whole coal below low water-mark ex adverso of both the entailed and unentailed lands, and the Crown agreed not to claim damages in respect of coal which had been worked in the past. After the proprietor came of age, he accepted an assignment of the lease, and subsequently applied for and obtained from the Crown a reduction of the royalty payable under the lease, and a modification of the whole mode of working the coal. When the proprietor so acted in regard to the lease, he was unaware that he had a claim to some of the coal below low water-mark. In an action brought by the proprietor fourteen years after he had reached majority, concluding, inter alia, for a declarator that he was not bound by the lease:—

Held, reversing the decision of the First Division of the Court of Session, that the actings of the proprietor after he came of age barred him from challenging the lease.

CROSS APPEALS from a decision of the First Division of the Court of Session, Scotland. (1)

(1) (1896) 24 R. 216.

The following statement of the facts is taken from the opinion of Lord Watson :—

"There are three ancient baronies—West Wemyss, East Wemyss, and Methil, lying adjacent to each other, along the north shore of the Firth of Forth, in the county of Fife, which have from time immemorial been the property of the respondent, Randolph Gordon Erskine Wemyss, and his ancestors. These baronies were by Crown charter of resignation and novodamus in favour of the second Earl of Wemyss, dated July 22, 1651, and confirmed by an Act of the Scottish Parliament in 1661, erected into a single barony under the title of the Barony of Wemyss.

"The lands comprised in these baronies were held and possessed by the late James Hay Erskine Wemyss, the father of the respondent Mr. Wemyss, partly under the fetters of an entail and partly in fee simple. Upon his death, in March, 1864, the respondent, who was at that time a minor in the sixth year of his age, succeeded, as heir of investiture, to the entailed portions of the estate. The deceased had, by mortis causa settlement, conveyed the unentailed portions of the estate to his wife and two other persons in trust, with directions that they should denude in favour of the respondent on his attaining majority, whom failing, in favour of a series of heirs therein designated. By the same deed the deceased appointed his trustees to be tutors and curators to his children during their pupillarity or minority.

"The fee-simple lands, which were vested in the trustees, appear to have included nearly the whole of the barony of West Wemyss, and did admittedly include certain coal-pits and workings at a point near to the western boundary of the barony. It is a matter of mutual admission that, by means of these coal-pits, the late James Hay Erskine Wemyss and his predecessors in title had worked, for a period exceeding forty years, coal lying under the bed of the sea, beyond the foreshore ; and also that these submarine workings were continued by the trustees. It is not averred, and there is no evidence that, submarine minerals had been worked for forty years from any of the three baronies except at that one point within the barony

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of West Wemyss. In May, 1875, the trustees entered into an arrangement with the Crown, the terms of which will be afterwards noticed, the result being that they accepted a lease from the Crown, for the term of thirty-one years from and after January 1, 1874, of all seams of coal, ironstone, and fireclay, lying under the bed of the sea, within an area extending seawards from the foreshores of the baronies of West Wemyss, East Wemyss, and Methil for an average distance of about two miles.

"The respondent, Mr. Wemyss, attained his majority on July 11, 1879. By disposition recorded in the Register of Sasines on August 22, 1879, the trustees under his father's settlement conveyed to him the whole of the unentailed lands which had been vested in them: and by assignation dated August 14 and 18, 1879, they made over to him their whole right and interest in the lease of submarine minerals which they had obtained from the Crown in the year 1875. The respondent accepted the assignation, and continued to work under the lease as tenant of the Crown until the present action was raised by him and the other respondent, William Nocton, to whom, along with himself, he had conveyed the barony and estate of Wemyss in trust by a deed executed in the year 1891.

"The summons, which was signeted in December, 1893, fourteen years after the entire estate had become vested in the respondent, Mr. Wemyss, concludes for declarator, (first) that the foreshore of the barony of Wemyss, including the baronies of West Wemyss, East Wemyss, and Methil, and (second) the coal and other minerals under the sea ex adverso of the said baronies and their foreshores, belong in property to the respondents, and are parts and pertinents of the united barony, subject in so far as regards the foreshore to their right as trustees for public uses. It also concludes (third) for declarator that the respondents are not bound by the terms and conditions contained in the lease of sea minerals granted by the Crown to the trustees of the late proprietor, or in an addition thereto made between the Crown and the respondent, Mr. Wemyss, dated July 21 and 25, 1890; and (fourth) alternately, for reduction of the said lease and addition thereto.

"The defender and appellant, the Lord Advocate, as representing the Crown, did not dispute that the respondents were entitled to a decree affirming that, subject to the interest of the public, they were, in virtue of their titles and possession following thereon, proprietors of the foreshore of the baronies. They opposed on various grounds the respondent's right to have declarator of property in minerals lying below the bed of the sea, and to have decree either annulling or reducing the lease of these minerals granted by the Crown to the trustees of the late proprietor; and pleaded that these claims are barred by the terms of the transaction which was entered into between these trustees and the Crown, and had been adopted by the respondent, Mr. Wemyss.

"The Lord Ordinary (Stormonth-Darling), with the consent of the appellant, decerned in terms of the first declaratory conclusion, affirming that the foreshores of the barony belonged in property to the respondents. His Lordship sustained the plea in bar advanced by the Lord Advocate, and, in respect thereof, assoilzied him from the remaining conclusion of the summons, with expenses. On a reclaiming note, the learned judges of the First Division allowed further proof, which was led; and, on December 11, 1896 (1), they recalled the interlocutor of the Lord Ordinary, of new pronounced a declaratory decree with respect to the foreshore, adding to the words of the summons, 'and to the coal under the foreshore of the said lands,' found and declared that the respondents as proprietors of the barony of West Wemyss have right to the coal lying under the sea ex adverso of the said barony; found and declared in terms of the third declaratory conclusion with respect to the lease libelled and addition thereto; dismissed the fourth and reductive conclusion as unnecessary, and quod ultra assoilzied the appellant, and found him entitled to four-fifths of his expenses."

As regards the circumstance that gave rise to the Crown plea in bar of the respondents' action, Lord Watson, continuing, gave the facts as follows:—"In the beginning of August, 1874, Her Majesty's Commissioners of Woods and

(1) 24 R. 216.

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Forests sent a letter to the respondent, Mr. Wemyss, who was at that time a minor in the seventeenth year of his age, intimating that the minerals under the Firth of Forth, unless specially granted, belonged to Her Majesty, and requesting to be informed by what authority he was working under the Forth at West Wemyss. That working was, in reality, carried on by the trustees, in connection with the unentailed lands and minerals which were vested in them. The letter was taken by Mrs. Wemyss, one of the trustees, the respondent's mother, to Melville & Lindesay, writers to the signet in Edinburgh, who were agents for the estate, both entailed and unentailed, with whom she had a personal meeting in regard to the subject of the commissioners' letter. On August 24 Melville & Lindesay replied that the family of Wemyss had worked coal under the bed of the sea in the most open and public manner for more than forty years, which was sufficient to exclude all interference on the part of the Crown, and they added: 'If, however, notwithstanding the above facts, you are advised that the Crown has right to the coal under the Forth, opposite to and connected with the barony lands, and is prepared to try the question of ownership in a court of law, we would be disposed to recommend to Mr. Wemyss, rather than enter upon a protracted litigation, to make some sacrifice by paying to the Crown a small rent or royalty for the coal he may find convenient still to take out under the existing very precarious working.'

"That suggestion was followed by an intimation from the commissioners, in a letter of September 25, 1874, to the effect that, subject to the approval of the Board of Treasury, they were prepared to grant to Mr. Wemyss a lease of the 'coal, culm, ironstone, and ore and fireclay' within and under the bed of the sea ex adverso of the lands and barony of Wemyss, upon certain conditions, for the term of thirty-one years as from January 1, 1874. Negotiations then took place between the commissioners and the firm of Melville & Lindesay, with the object of settling the terms of the lease which it was proposed should be granted by the Crown and accepted by the proprietors of the lands and barony of Wemyss. These

negotiations lasted until the month of November, 1874, when the whole terms of the proposed lease were finally arranged.

"On October 17, 1874, Melville & Lindesay had written to the commissioners indicating that their clients were disposed to accept the terms then offered by the Crown, subject to certain modifications, adding by way of precaution, 'Of course the present negotiation is not to be held as prejudicing in any way the rights and pleas of the proprietor of Wemyss.' The commissioners then wrote agreeing to some of these modifications, and in a letter of November 21, 1874, they asked an assurance that the reservation just quoted 'was made only to meet the contingency of the negotiations being fruitless.' On November 23 Melville & Lindesay replied: 'You are correct in assuming that the reservation in our letter of the 17th ultimo was made only to meet the contingency of the negotiations being fruitless.' Mrs. Erskine Wemyss, in her evidence as a witness for the respondents, admitted that Melville & Lindesay's letter of October 17 was submitted to her and that she approved of its terms. She stated that she had given special instructions to Mr. Lindesay that the proprietary rights of the estate were to be carefully safeguarded, that the reservation in the letter met her views upon the subject, and that the explanation in Melville & Lindesay's letter of November 23 to the effect that the reservation was intended to meet the contingency of the negotiations proving fruitless was made without her authority. To my mind that circumstance is immaterial. Had the letter of November 23 never been written, I am of opinion that as soon as the negotiation had been concluded with the trustees, and had passed into an agreement, and a lease had been granted in terms of that agreement, the reservation could not have been construed in any other sense than that attributed to it by Messrs. Melville & Lindesay.

"As already stated, the terms of the lease were finally adjusted and agreed to in November, 1874; and, on January 7, 1875, a draft lease was sent to Melville & Lindesay to be communicated by them, for revisal, to the law agents for the commissioners. On January 19 Melville & Lindesay wrote to the

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commissioners' law agent: 'Until young Mr. Wemyss is of age in 1879, the lessees will be the trustees of his late father, and we have substituted their names for his.' The lease was finally settled between the agents in April, 1875; and it was formally executed on behalf of the Crown, as lessor, of the one part, and by Mrs. Erskine Wemyss and Sir David Baird, of Newbyth, two and a quorum of the trustees, as tenants of the other part, on April 20 and 28 and May 3, 1875.

"By the lease thus executed there were let to the trustees, for the space of thirty-one years from and after January 1, 1874, the whole coal, ironstone, and fireclay in or under the bed of the sea, within an area bounded on the north-west by the ordinary low water-mark, on the north-east by a straight line drawn in the direction thirty degrees east of south by true meridian, on the south-west by a straight line drawn in the direction forty-five degrees east of south by true meridian, and on the south-east by a straight line drawn from the south-eastern extremity of the north-eastern boundary to the south-western extremity of the south-western boundary. The area so defined included the whole of the specified minerals lying in or under the bed of the sea ex adverso of the three baronies of West Wemyss, East Wemyss, and Methil, to a distance of about two miles from the foreshore. The lease also contained a provision to the effect that it should not be competent for the Crown to raise any question with, or to make any claim against, the lessees in respect of workings by the lessees, and their predecessors or authors or tenants, of coal or other minerals under the sea ex adverso of the lands and barony of Wemyss prior to January 1, 1874.

"The trustees continued to work under the lease, and to make payment of the royalties due to the Crown until July, 1879, when the respondent, Mr. Wemyss, attained majority, and the trustees denuded themselves of the trust estate in his favour in the month of August, 1879. The said respondent, having obtained a conveyance to the property of the unentailed lands, and also an assignation to the Crown lease of submarine minerals, continued to work under the lease, and to occupy, without objection or challenge, the position of a tenant of the

Crown until the present action was brought in December, 1893.

"In March, 1887, the said respondent, through his agents Melville & Lindesay, applied for a reduction of the royalty of 4*d.* per ton, payable under the lease for common coal, to a royalty of 2*d.* per ton. The commissioners ultimately agreed to reduce the royalty to 2½*d.* per ton, and effect was given to the reduction from and after July 1, 1887. Again, in the year 1890, the same respondent made a successful application to the Crown to vary the conditions of his lease, by permitting him to work the Chemiss Seam, which was above forty-two inches in thickness, by the method known as 'Longwall,' or complete excavation, when the seam is found at a depth below the bed of the sea of not less than 180 fathoms, and when such a mode of working is considered safe and suitable by the Home Office inspector for the district for the time being. A minute varying the conditions of the lease to that extent was indorsed upon the lease itself, and was duly executed by the respondent, Mr. Wemyss, and by one of the commissioners as representing Her Majesty."

1897. Dec. 9, 10, 15. 1898. May 16. *A. Graham Murray, L.A.*, and *C. N. Johnston* (both of the Scottish Bar), for the appellant, the Crown. The case was disposed of in the Court of Session upon the footing that the trustees of Mr. Wemyss had, while he was a minor, bargained away rights belonging to him as heir of entail. But even if that were so, Mr. Wemyss is now barred by his own actings from questioning the lease, for after he came of age he accepted an assignment of the lease and assigned it to himself. He applied for and obtained a reduction of the royalty. He also applied for and obtained a modification of the mode of working the coal. He worked as tenant under the lease, and paid royalties for minerals to which he now asserts a proprietary right (West Wemyss). He also worked minerals which the Court of Session have found were the property of the Crown; and it was not until fourteen years after he came of age that he and his trustees raised this action. In these circumstances, coupled with the fact that the lease

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was a compromise, the lease cannot now be reduced: Stair, I. 7, 9; Bell's Prin. 535; *Kennedy* v. *Kennedy* (1); *Stewart* v. *Stewart* (2); *Cooper* v. *Phibbs* (3); *Earl Beauchamp* v. *Winn* (4); *Dickson* v. *Halbert* (5); *Haldane* v. *Ogilvy*. (6) The Crown has not raised any question as to Mr. Wemyss' right to the foreshore, but the Crown denies his right to the minerals under the solum below low water-mark. There is no authority for the proposition that a title of barony with parts and pertinents, with possession of the minerals under the foreshore and also under the sea, carries a right so far-reaching as a right to the minerals below low water-mark ex adverso of the barony lands.

As to East Wemyss, the express title to minerals infra fluxum maris does not give a right to the minerals under the sea below low water-mark. This grant of coal first appeared in a Crown charter dated 1616, then in a charter of 1630, and in the same words in a charter of 1651, which last united for a time the barony of East Wemyss to the baronies of West Wemyss and Methil. The charter of 1651 was ratified in 1661 by the Scottish Parliament, and in the Act the words "infra fluxum maris" are given as within the sea flood. Therefore, the barony is given a distinct boundary, and beyond that boundary or limitation there is no title upon which to found prescriptive working.

As to Methil, the lands of Methil having been disjoined from the united baronies through the restoration of the superiority to the Archbishop of St. Andrews in 1662, and no right of minerals below low water-mark shewn to have been derived from the Church, Mr. Wemyss has no right to them.

As to prescriptive possession ex adverso of the united baronies, Mr. Wemyss' contention was that under a barony title possession of a part is equivalent to possession of the whole, and accordingly that, presuming he has shewn possession below low water-mark ex adverso of West Wemyss, that right extends

(1) (1843) 6 D. 40.
(2) (1836) 15 S. 112; affirmed (1839) M'L. & R. 401.
(3) (1867) L. R. 2 H. L. 149.
(4) (1873) L. R. 6 H. L. 223.
(5) (1854) 16 D. 586.
(6) (1871) 10 M. 62.

along the whole sea front of the united baronies; but the Crown's case was that possession presumed in the case of West Wemyss cannot be extended to minerals below low water-mark ex adverso East Wemyss, the charter of that barony having a limited grant to low water-mark. Therefore, nothing that took place opposite West Wemyss can avail East Wemyss, nor can it avail the barony of Methil.

[They also cited *Lord Advocate* v. *Cathcart* (1), *Lord Advocate* v. *Clyde Trustees* (2), *Lord Advocate* v. *Hunt* (3), *Agnew* v. *Lord Advocate* (4), *Clyde Trustees* v. *Lord Blantyre* (5), and *Montrose* v. *Macintyre*. (6)]

Asher, D.F., and *Ure, Q.C.* (both of the Scottish Bar), for the respondents. By the Crown charter of 1651, confirmed by Act of Parliament in 1661, Methil, East and West Wemyss were all united, and became the barony of Wemyss. The union of Methil with East and West Wemyss was never dissolved. The owner of a barony on the seashore with parts and pertinents is presumably the proprietor of the foreshore, and the grant carries the minerals below low water-mark if the minerals under the sea are a continuous strata and can be worked without injury to public rights: see Bell's Prin. s. 642; *Innes* v. *Downie* (7); *Paterson* v. *Marquis of Ailsa* (8); *Lord Saltoun* v. *Park* (9); *Macalister* v. *Campbell* (10); *Nicol* v. *Blaikie* (11); *Hunter* v. *Lord Advocate*. (12) And, although *Agnew* v. *Lord Advocate* (4) contains hostile opinions against a barony title being alone sufficient to carry submarine minerals, yet that case did not decide the question.

As to East Wemyss, the grant is infra fluxum maris. These words mean within the sea flood—that is, seawards up to the point to which the sea flows: *Berry* v. *Holden*. (13) No one but the baron can work the minerals below low water-mark,

(1) (1871) 9 M. 744.
(2) (1891) 19 R. 174.
(3) (1867) 5 M. (H. L.) 1.
(4) (1873) 11 M. 309.
(5) (1879) 4 App. Cas. 770; 6 R. (H. L.) 72.
(6) (1848) 10 D. 896.
(7) (1807) Hume, 552.
(8) (1846) 8 D. 752.
(9) (1857) 20 D. 89.
(10) (1837) 15 S. 490.
(11) (1859) 22 D. 335.
(12) (1869) 7 M. 899.
(13) (1840) 3 D. 205.

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and that fact is to be taken into consideration when construing the grant.

As to West Wemyss, there has been undoubtedly working of the coal below low water-mark for the prescriptive period, and, further, that possession extended the right to all the coal ex adverso the other baronies of East Wemyss and Methil. As to the question whether the words used in the charter of 1651, namely, "within the sheriffdom of Fife," excluded the minerals below low water-mark, it would be unreasonable to hold that the solum under the sea is outside the adjoining county. If it was within the county in 1651 it is so now; and, further, if the minerals under this solum were once the property of the Crown, they were alienable by the Crown and were intended to pass under the said charter. Assuming that the Crown had intended to make a grant of the coal under low water-mark, the grant would be appropriately worded by saying that the barony was within the sheriffdom of Fife, as that would distinguish the extent of the right from the opposite shore. It seems to have been conceded in the *Franconia Case* (1) and *Lord Advocate* v. *Clyde Trustees* (2) that an arm of the sea can be within a county: see also *Cuninghame* v. *Assessor for Ayrshire* (3); Russell on Crimes, 6th ed. p. 11; 11 Geo. 4 and 1 Will. 4, c. 69, s. 22; Ersk. I. 3, 33.

As to the plea in bar of the action, the transaction of 1874 ending in a lease cannot stand, for the trustees dealt with the whole coal ex adverso the three baronies—that is, ex adverso the entailed lands as well as the freehold lands; but the trustees had no right to deal with the rights attaching to the entailed lands; and, further, West Wemyss was not wholly freehold, for part of it was entailed; therefore, on these grounds the trustees had no power to make the compromise, and, the transaction being in part inept, fell as a whole. Again, if there was going to be any surrender of rights on the part of Mr. Wemyss, that surrender ought to have been mentioned in the lease. When the lease was assigned to Mr. Wemyss he did

(1) *Reg.* v. *Keyn*, (1876) 2 Ex. D. 63. (2) 19 R. 174.
(3) (1895) 22 R. 596.

not know of his rights; then, in 1890, he discovered two letters; the question is whether the delay was too great, the Crown having suffered no prejudice by the delay. If the question concerning the West Wemyss coal does not arise now, then we ask that the judgment be such as not to prejudice that question on the expiration of the lease.

A. Graham Murray, L.A., in reply. *Agnew* v. *Lord Advocate* (1) decided that where a barony charter gives the sea as its boundary it is not to be presumed without more that the foreshore passes. The baron has to shew de facto that the foreshore is part of the barony. But there is not a trace in the books of a baron establishing his right to minerals below low water-mark as parts and pertinents of the barony. There is no doubt that if Mr. Wemyss could shew a special grant of coal below low water-mark he would succeed; but the charters here shew no such special grant.

The House took time for consideration.

1899. July 31. LORD WATSON. I may state that their Lordships in this case have resolved to follow the precedent that was adopted by the House in 1861 in the Scottish Appeal of *Galloway* v. *Craig*. (2) In that case the late Lord Campbell had heard the appeal, but died before delivery of the judgment. In this case our late lamented colleague, the noble and learned Lord Herschell, had prepared a judgment before his death, and I shall now ask Lord Shand to deliver it.

The late LORD HERSCHELL'S judgment was accordingly read by Lord Shand. After stating the facts to the same effect as in Lord Watson's judgment, it continued :—

It will be convenient, in the first instance, to consider the appeal of the pursuer against the decision that he was not entitled to the coal ex adverso the lands of East Wemyss and Methil, inasmuch as his right to this coal may have material bearing on the question, what was the effect of the transaction which took place in the year 1874 as regards the coal ex adverso the lands of West Wemyss.

(1) 11 M. 309. (2) (1861) 4 Macq. 267.

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It was argued at the bar on behalf of Mr. Wemyss, in the first place, that the proprietor of a barony bordering on the seashore was presumably the proprietor of the foreshore. There is considerable authority against this proposition, and for the contention on behalf of the Crown that in order to establish a title to the foreshore, where it is not expressly included in the terms of the grant of the barony, it is necessary to prove acts of ownership upon it. I will assume, however, for the purpose of the argument in the present case, that the contention of Mr. Wemyss is so far well founded. It was then further contended that not only was the grant of the barony to be presumed to carry with it the foreshore, but also the coal under the sea below low water-mark. There was some hesitation in fixing the limit seaward, to which the grant was to be taken to extend. Whether it was as far as the coal could be worked from the barony, or in the case of a mare clausum to the medium filum between the two shores, or in the case of the open sea to the three-mile limit. It was not maintained that the bed of the sea below low water-mark passed to the grantee of the barony, but only the strata of coal lying beneath it, that is to say, that by the grant of the barony these strata of coal were severed from the surface and created into a separate tenement. There is not, in my opinion, even a semblance of authority in support of the contention thus advanced, nor can I see any sound reason on which it can be vested. Yet it is on this, and on this alone, apart from prescription, that the claim to the coal under the sea ex adverso the baronies of West Wemyss and Methil is based.

It is asserted that the coal ex adverso East Wemyss may be claimed by virtue of the titles relating to that barony. By the charter of July, 1651, already referred to, there was granted the barony of East Wemyss, with its coals and coal workings, and also the right of getting and winning coals "infra fluxum maris infra bondas predictas." It was argued that these words conveyed the right to the coals under the sea below low water-mark ex adverso East Wemyss. In my opinion the words "fluxum maris," as used in this charter, mean the foreshore over which the sea ebbs and flows, and nothing more. It is, I

think, the coal under the foreshore which is here designated, whether the word "infra" be construed strictly as meaning underneath, or whether it be regarded as a substitute for "intra," which would seem to be the case, having regard to the words "infra bondas predictas" which immediately follow. A case was cited in which it was said that fluxum maris had been construed to mean the line of high water-mark. That may have been a perfectly proper interpretation of the words of the instrument then in question. I do not think it is the meaning to be attributed to them in the charter of 1651. But if it were, I am at a loss to see how the contention could be a valid one that infra or intra fluxum maris would then mean the coal seawards of high water-mark. I may observe that in the Act of Parliament of 1661, which ratified the charter, the words "infra fluxum maris" are rendered "within the sea flood"—words which seem to me equally apt to describe the foreshore.

I have, therefore, come to the conclusion that, apart from prescription, Mr. Wemyss has not made out a title to the coal under the sea ex adverso any of the baronies.

I now come to the alleged title by prescription. There has undoubtedly been a working of coal under the bed of the sea ex adverso West Wemyss for the prescriptive period. The question is whether the possession of these coal workings can be referred to the barony title. I agree with the Court below in thinking that they can. But whether the possession of these coal workings would establish a title, as the Court below have held, to all the coals seaward so far as they could be worked from the barony, or to any other limit seaward, or only to the area of which there has been actual possession, is a different question, and one of no small difficulty. I do not, however, in the view which I take of the case, find it necessary to pronounce an opinion upon it.

It was urged that although possession had only been taken of coal under the sea ex adverso West Wemyss, yet inasmuch as the baronies of West Wemyss and East Wemyss were united into a single barony of Wemyss by the charter of 1651, the prescription arising from the working of the coals alluded to

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sufficed to establish a title in respect of the coal ex adverso the entire barony of Wemyss. But for the specific grant of coals in connection with the barony of East Wemyss to which attention has been called, this might perhaps have been the case. But although the two baronies were united by the charter, the limits and rights of the two baronies are separately stated and defined. I have already said that, in my opinion, the right to the coals under the foreshore of East Wemyss is expressly granted. It appears to me to be a bounding charter in the seaward direction so far as the lands of East Wemyss are concerned, and I do not think the barony title will support a prescriptive claim further seawards.

It was scarcely contended at the bar, and, in my opinion, is not open to argument, that possession for the prescriptive period ex adverso West Wemyss could confer a title to the coal ex adverso Methil, which, although for a short time united with the two baronies of Wemyss as one barony, ceased to be so united more than two centuries ago.

For these reasons I concur with the Court below in thinking that Mr. Wemyss has established a prescriptive right to some coal under the sea ex adverso West Wemyss, but that he has not made out a right to any such coal ex adverso East Wemyss or Methil.

I have now to deal with the transaction which took place in 1874, by which it is alleged that Mr. Wemyss is barred from asserting any right to the submarine coal which he might otherwise have established. In August, 1874, the Office of Woods called attention to the workings under the bed of the Firth of Forth at West Wemyss, and inquired under what authority the coals were being worked by Mr. Wemyss, as the Office was not aware of any grant in his favour. This letter was addressed to Mr. Wemyss, who was then a minor, but the officials of the Office of Woods were apparently not aware of this until the close of the negotiations which led to the granting of the lease about to be referred to. The law agents who acted for the Wemyss family and the trustees of the estates replied to the letter addressed to Mr. Wemyss, setting forth the grounds of the claim to work the coal under the bed of the

Firth of Forth, but stating that if the Office of Woods were advised that the Crown had a right to the coal under the Forth opposite to and connected with the barony lands, and was prepared to try the question of ownership in a court of law, they would be disposed to recommend Mr. Wemyss, rather than enter into a protracted litigation, to make some sacrifice by paying to the Crown a small rent or royalty. To this letter a reply was sent by the Office of Woods, maintaining the right of the Crown to the coal in question, and that Mr. Wemyss was liable to account for the full value of the coal already raised and gotten. It is not necessary to pursue further the course of the negotiations which ultimately led to the lease. It is only necessary to call attention to the fact that in a letter from the law agents of October 17, 1874, there occurred the following passage: "Of course the present negotiation is not to be held as prejudicing in any way the rights and pleas of the proprietor of Wemyss." In a letter from the Office of Woods of November 21 following it was stated that this remark required explanation before the lease was proceeded with, and inquiry was made whether it were a correct assumption that this reservation of rights and pleas was made only to meet the contingency of the negotiation being fruitless. The law agents on November 23, in answer to this inquiry, said: "You are correct in assuming that the reservation in our letter of 17th ultimo was made only to meet the contingency of the negotiation being fruitless." In the month of April, 1875, as the result of the negotiations, a lease was granted by the Commissioners of Woods to the trustees under the trust disposition and settlement made by the pursuer's father, of the coal under the sea ex adverso all three baronies, for a term of thirty-one years from January 1, 1874, at a fixed rent of 10*l.* a year and certain royalty rents which were to merge pro tanto in the fixed rent. This lease was in August, 1879, after Mr. Wemyss had attained his majority, assigned by the trustees with the consent of the commissioners to Mr. Wemyss and the heirs of his body, with certain destinations over, and on February 14 following Mr. Wemyss made an assignation in favour of himself.

No doubt was, I think, entertained in the Court below, and

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I can entertain none, that if this lease had referred exclusively to coal ex adverso West Wemyss the transaction would have barred any claim which Mr. Wemyss might have had to those coals by virtue of his prescriptive title. The whole of the lands of West Wemyss bordering on the sea were vested in the trustees in fee. They had full power to enter into a transaction by way of compromise in relation to any claim connected with them. The Courts have always strenuously upheld transactions entered into for the purpose of averting threatened litigation with reference to rights which may be in dispute; and it does not admit of doubt that this was a transaction of that description. The correspondence renders this quite clear, especially the passages in the letters of October 17 and November 21, 23, 1874, which have been quoted.

Whilst, however, the lands of West Wemyss bordering on the sea, as has been stated, vested in the trustees, part at all events of the lands of East Wemyss and the whole of those of Methil bordering on the sea were vested in Mr. Wemyss and not in the trustees. It was on this that the judgment against the Crown was founded. The Lord President said: "It is clear that the rights of Mr. Wemyss in the entailed estate were not effectually dealt with during his minority, for he was not so much as made a party to the transactions which touched them. Nor does it seem possible to separate the action of the trustees in regard to the unentailed lands from their action in regard to the entailed lands. The transaction purported to be one and was one, and it is impossible to affirm the validity of part whilst negativing the validity of the whole." Lord Adam on the same point says: "The lease includes the minerals of both the entailed and unentailed lands. . . . . It appears to me that in order to constitute a valid lease of the coal in the entailed lands the lease should have been entered into by Mr. Wemyss with the consent of his curators."

My Lords, if it had been found that Mr. Wemyss had a title in right of his entailed lands to any coal under the sea ex adverso of them, I could understand this reasoning and should not dissent from it. But the judgment of the Court was to the effect that all these coals were the property of the Crown,

and that the proprietor of East Wemyss and Methil never had any title to them. I do not think it can have been brought home to the mind of the Court that the only coal under the sea to which a right has been shewn was in 1874 vested in the trustees, who had full power to enter into a transaction renouncing that right. I am confirmed in this view by the language of Lord Adams. He speaks in the passage quoted of the lease including "the minerals of the entailed lands." This is erroneous. The minerals under the sea ex adverso the entailed lands were not and never had been "minerals of the entailed lands." It is true that they were leased to the trustees. But this was to their advantage. If the lands of East Wemyss and Methil had belonged to some one wholly unconnected with the trustees or West Wemyss, why would not the grant of a lease by the Crown of the coal under the sea ex adverso of these lands have been perfectly valid as a part of the transaction for settling a dispute between the Crown and the proprietors of West Wemyss as to the right to work under the sea? And what difference can it make that Mr. Wemyss was the owner of East Wemyss and Methil?

For these reasons I think there is no ground for impeaching the transaction which culminated in the lease of 1875, and that Mr. Wemyss is thereby barred from asserting his right to the only coal under the sea to which he has established any title.

Even if I were not satisfied on this point, it does not seem to me clear that Mr. Wemyss would be entitled to judgment. He became aware in February, 1890, that the lease of the sea coal had been taken in 1875 in consequence of a question having been raised by the Crown as to his right to the coal under the sea. Instead of then looking into the matter and asserting any right on which he intended to insist, he sends the documents to his law agent with the remark, "When matters get more settled we might look into the matter, though at present we had better let it lie." He continued working the coal under the lease, and subsequently obtained by negotiation an alteration of some of its terms, which were recorded in a minute of alteration annexed to the lease signed by Mr. Wemyss

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on July 21, 1890. It was not until December 27, 1893, that he raised this action. It may be that he was not in July, 1890, fully aware of his rights, but the means of ascertaining them were in his possession. I greatly doubt whether, under such circumstances, a person is entitled to put aside inquiry to take the benefit of a transaction, and even obtain a variation of it in his favour, and three years afterwards insist that it should be declared invalid.

LORD WATSON. [His Lordship having stated the facts as given above at p. 49, continued:—] I have come to be of opinion with my noble and learned friends, that the plea in bar of action, stated on behalf of the Crown, ought to prevail. In that view, it becomes unnecessary to give judgment upon the merits of the respondents' action, in so far as it concludes for declarator of their property in minerals outside the foreshore; but the claim preferred by the respondents being one of novelty and importance there are some considerations affecting it which I desire to notice before adverting to the plea of bar.

I see no reason to doubt that, by the law of Scotland, the solum underlying the waters of the ocean, whether within the narrow seas, or from the coast outward to the three-mile limit, and also the minerals beneath it, are vested in the Crown. Whether the Crown could make an effectual grant of that solum or of any part of it to a subject appears to me to be a question not unattended with doubt; but I do not think that the Crown could, without the sanction of the Legislature, lawfully convey any right or interest in it which, if exercised by the grantee, might by possibility disturb the solum or in any way interfere with the uses of navigation, or with any right in the public. The mineral strata below the bed of the sea, in so far as they are capable of being worked without causing disturbance, appear to me to stand in a different position. To that extent, I know of no principle of Scottish law which could prevent the Crown from communicating the right of working to a subject, in the character either of tenant or proprietor. If that be so, it would follow that submarine minerals, if expressly included, might, to the extent which I

have indicated, be competently made parts and pertinents of a baronial or other Crown grant of adjacent lands. But it is by no means so clear that, when these minerals have not been expressly included in a grant of barony, the whole submarine mineral field lying ex adverso of the barony lands ought to be treated upon the same footing as the foreshores of a barony have hitherto been dealt with in our law; or that the baron's prescriptive working, at one point, of a comparatively small portion of a single seam, ought to be received as evidence either that he had actual possession of the whole submarine field, or as shewing by implication that the field was included in the original grant.

The learned judges of the First Division appear to have regarded the relation of the minerals claimed by the respondents to the barony of Wemyss as being, if not strictly the same, at least analogous to the connection between a barony and its foreshores, where these have not been expressly granted; and their Lordships, with much force, point to various considerations which, so far as they go, tend to support that view, such as the immediate vicinage of the sea minerals, and the fact, which they assume, that these minerals cannot be worked except from the barony lands or foreshores. Whether the latter fact ought to be assumed as having application all round the coast of Scotland, I am not prepared to say: I should have thought that in some, if not many localities, it could not be accepted as true. And, on the other hand, I am disposed to believe that, at the dates when the three original baronies were created, as well as at the time when they were subsequently united, it might be safely predicated that neither the Crown nor its grantees had it in contemplation that the grants were to carry any right to work submarine minerals. If that conclusion could be legitimately reached, it would seriously differentiate the position of adjacent sea minerals from that of the foreshores of a barony which, according to an opinion expressed by many eminent Scottish judges, are carried by the mere grant of barony, without their being expressly mentioned. That doctrine has not been expressly affirmed by a judgment of the Court; but the contrary has never been expressly decided, although,

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in the majority of cases, an opposite doctrine appears to have been followed.

There is, in my apprehension, or ought to be, a practical distinction recognised between the prescriptive possession which establishes a new and adverse right in the possessor, and the prescriptive possession which the law admits, for the purpose of construing or explaining, in a question with its author the limits of an antecedent grant or conveyance. In the first case the rule obtains tantum prescriptum quantum possessum. In the second, it appears to me that a much more liberal effect has been given to partial acts of possession as evidencing proprietary possession of the whole, in cases where the subject of controversy has been in itself a distinct and definite tenement. The foreshore is simply a tract of land, at times covered by the tide and at other times dry, and is in many respects attended with the same incidents as land estate situated above the level of high tide. When the subjacent minerals have not been severed from it in title, an absolute grant of foreshore will, just as in the case of other land, carry the whole materials below it usque ad centrum; and in the absence of express grant, the fact of the baron's having worked a mineral seam below it might be reasonably regarded as a strong act of possession, to be taken into account along with other acts and circumstances, in determining whether he and his predecessors in title had been in prescriptive proprietary possession of the whole foreshore.

For a definition of what will constitute sufficient evidence of such possession, I may refer to the remarks made by Lord Blackburn in *Lord Advocate* v. *Lord Blantyre*. (1) In the case of mineral strata lying below the bed of the sea, it is doubtful whether they have any covering tenement which could be made the subject of a feudal grant; and if such tenement were possible, it is not claimed by the respondents. In their natural state these strata are mere partes of the soil under the surface of which they lie, and it may be doubted whether there is any such connection between them as would justify the inference that the owner of a barony situated on the coast where he

(1) 4 App. Cas. 770, 791.

works one of the strata, in whole or in part, ought to be regarded as having possessed them all.

The original and older titles of the three baronies in question have not been produced. But the titles to West Wemyss, which are in process, describe the barony and its pertinents as lying "infra vice-comitatum nostrum de Fyff." I entertain no doubt that these are "bounding" words; and that the respondents could not claim, as pertinent of the barony, any subject lying in the county of Perth. I can hardly believe that at the time of the grant the Firth of Forth was understood to be within the vice-comitatus of Fife, or that at that date, or for centuries afterwards, any Court of Scotland would have so held.

I have made these observations, not with the view of expressing any final judicial opinion, but simply for the purpose of suggesting some considerations which will require to be disposed of when it becomes necessary to decide either of these three questions: (1.) Whether prescription by partial working of minerals under the sea ex adverso of his barony, under a general grant which does not expressly include these minerals, will give the baron a title to the whole minerals which are capable of being continuously worked from his lands? If so, (2.) whether the partial working of one seam ought to be regarded as proprietary possession of the whole seams of such minerals so far as workable from the barony? And (3.) how far seawards, in the case of a firth or estuary, prescriptive right of working acquired by mining close to the foreshore can be held to extend? I shall now, in referring to the merits of the respondents' claim, assume in their favour that, as appears to have been held by the learned judges of the Division, all these questions ought to be answered in favour of the respondents. Upon that assumption, in which I am not at present prepared to acquiesce, I have to express my concurrence in certain points of considerable importance which were ruled by their Lordships in arriving at their judgment.

In the first place, I think it is not matter of reasonable inference from the terms of any of the charters or other titles in process that submarine minerals ex adverso of the three

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baronies of West Wemyss, East Wemyss, and Methil, or of the larger barony created by their union, were included in the grants made by the Crown; although, upon the assumption which the Court below has made, such minerals might be brought within their ambit, through the explanatory aid of a very limited possession by the barons, during the period of prescription.

In the second place, I am of opinion that the description of the barony of East Wemyss and its parts and pertinents contained in the Crown charter of July 22, 1651, does in effect constitute a bounding charter, the extreme boundary seawards being the low water-line of the foreshore; and that the baron is consequently precluded from acquiring or otherwise comprehending in his original grant sea minerals beyond that limit by reason of his prescriptive possession. The words "infra fluxum maris" do not, in my opinion, refer to the permanent waters of the ocean, but solely to that part of them which is liable to flux and reflux, or, in other words, which covers the foreshore during high water. That such is their true meaning is made clear by the words which immediately follow them in the same sentence—"infra bondas prædictas." These "foresaid" boundaries refer back to the general description of "omnes alias partes et pendicula quæcunque dict̃ terrarum et baroniæ de Eist Wemyss, jacen̄ in parochiâ de Wemyss." That parochial boundary is strictly territorial, and can include no part of the waters or bed of the sea beyond the foreshore. My noble and learned friend, Lord Herschell, has called attention to the fact that in the Act of 1661 confirming the Union Charter of 1651 the words "infra fluxum maris" are rendered "within the sea flood."

In the third place, I agree with the learned judges of the First Division in thinking that, inasmuch as the submarine minerals lying ex adverso of the baronies of West Wemyss and Methil respectively are so separated in locality by the intervening sea minerals of East Wemyss, to which the respondents are not in the position of having acquired any right by prescription, the baron's working of minerals below the sea in connection with the seams opposite to his lands of West

Wemyss cannot be regarded as an act of possession exercised in the mineral field which the respondents claim ex adverso of the barony of Methil. The finding would be applicable to a claim for foreshore when there is a considerable space intervening between the parts claimed, and it is, in my opinion, applicable a fortiori to a claim for separate sea minerals.

The result of these rulings, in which I concur, is, even on the assumption which I have already stated, to exclude the respondents' claims for submarine minerals connected with the baronies of East Wemyss and Methil. In the case of East Wemyss there is a bounding charter, and prescriptive possession cannot operate beyond the outer margin of the foreshore, which is the limit prescribed. In the case of Methil it was made matter of admission in the course of the proof "that there never was any working of the coal under the bed of the sea below the low water-mark ex adverso of the lands of East Wemyss and Methil until after the year 1874." It is not stated at what date these workings commenced or how long they were continued. But they have been since the beginning of 1874, and until the date of this action, carried on under a Crown lease, and so far can be of no avail to set up the title of the baron as against the Crown. It would be in the power of the Crown at any time within forty years from the date at which the respondents or their successors might begin to work the sea minerals ex adverso of the lands of Methil, as in the assertion of a proprietary right, to extinguish their inchoate and imperfect title by declarator.

The result of holding, as your Lordships were evidently prepared to do, that the compromise and lease of 1875 are effectual and binding upon the respondent Wemyss, so far as regards the unentailed lands and minerals of the barony of West Wemyss, to which he derived title from his father's testamentary trustees, was that the respondent, for the first time in the course of the case, asserted that a small portion of the lands of West Wemyss, lying on the east side of the barony, and abutting on the seashore, was under the fetters of the entail, and did not belong to the trustees. The record and the evidence in process are silent on the subject. Counsel

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for the Crown, whilst unable to give any admission, was, of course, not prepared to affirm that on investigation the fact might not prove to be as asserted in argument. If it were, it would necessarily follow, in your Lordships' opinion, that the respondents could not in any view lay claim to the property of submarine minerals, except such as were attached to and lying ex adverso of the foreshore of that eastern portion of the barony of West Wemyss which was shewn by them to be within the entail, and to that extent formed part of the estate to which the respondent, Mr. Wemyss, succeeded upon his father's decease.

I shall now refer to the circumstances which have given rise to the Crown plea in bar of action. [His Lordship gave the facts set out above, and continued:—]

The correspondence to which I have referred between the officers of the Crown and Messrs. Melville & Lindesay, followed as it was by the adjustment and execution of a Crown lease of the minerals under the bed of the sea ex adverso of the united barony of Wemyss, embodies an arrangement in nature of a compromise, by which the owners of the barony lands, whether entailed or unentailed, were to obtain a lease of those minerals for the term of thirty-one years, in consideration of their conceding the right of the Crown to the property of the minerals. A transaction of that kind cannot according to the law of Scotland be lightly set aside; and it is not impeachable upon many grounds which would be sufficient to infer reduction of an ordinary agreement. The considerations upon which that rule rests are fully explained by Lord Stair (Inst. B. 1, tit. xvii. ss. 1 and 2). It must, of course, be shewn that the arrangement was not an idle transaction between the Crown and agents who professed to have, but did not possess any authority to bind the owners of the barony and land; but the latter will be bound if it appear either that they sanctioned the arrangement at the time or that it was subsequently adopted by them. At the time of the transaction there was this material difference between the position of the owners of the unentailed and the owner of the entailed portions of the estate of Wemyss—that the former were all sui juris, whilst the latter

was in minority. It will therefore be convenient to consider separately whether the transaction was binding upon the trustees of the late James Hay Erskine Wemyss, who ceased in 1879 to have any interest in the unentailed lands, and whether it is now obligatory on the respondents, who are proprietors of the whole barony and lands.

In my opinion it is sufficiently established that the trustees sanctioned the arrangement which was made with the Crown by Melville & Lindesay, and that they were aware of its terms when they entered into the mineral lease of April and May, 1875. One of their number, Mr. Jonathan Peel Baird, does not appear to have interfered actively in the management of the trust, and he did not subscribe the lease, which was executed by Mrs. Erskine Wemyss and Sir David Baird, being a quorum of the trustees. Mrs. Erskine Wemyss took a more active share than either of her co-trustees, and was generally cognizant of the whole course of the negotiations from first to last. The lady states in her evidence that she "was the acting trustee," from which I infer that she was permitted by her co-trustees to assume that position, and that they were content to recognise and, if necessary, confirm her acts of management. Mrs. Erskine Wemyss, according to her own statement, read Melville & Lindesay's letter of August 24, 1874, in which the firm suggested that, in the event of the Crown being prepared to try the question of right to the sea minerals in a court of law, they would recommend Mr. Wemyss to avoid a protracted litigation by paying a small rent or royalty to the Crown. Mrs. Wemyss says: "That letter conveyed to me that a question of right was raised, and that Mr. Lindesay advised compromise, and with that knowledge I left myself entirely in his hands as the agent of the trustees. Further, I saw and approved on his advice of the letter of October 17, 1874." The last-mentioned letter shews that the whole terms of the lease which was to be granted by the Crown had been adjusted, and would be accepted by Mr. Wemyss and his advisers subject to modification in regard to three points. These points were subsequently either adjusted to the satisfaction of Melville & Lindesay or were conceded by the Crown. I cannot come to the conclusion that

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the trustees, other than Mrs. Erskine Wemyss, in accepting the lease from the Crown and in working under it for more than four years as tenants the minerals which they had previously worked as proprietors, were ignorant of the fact that in so doing they were giving effect to an arrangement which had been made with the authority of one of their number in whom they had such confidence that they practically left to her the administration of the trust. It is quite possible that they may not have carefully studied the terms and conditions of the transaction; but it appears to me to be equally clear matter of inference that, whatever these terms and conditions were, they were willing to assent, and did in point of fact assent, to them.

The trustees did not labour under any defect of power to enter into the transaction, because the trust deed under which they acted gave them very wide authority, including ample powers of "compromise and submission." Accordingly, their transaction was effectual to bind, not only themselves, but the land in which they were vested, and all who might derive title from them, under the destination contained in the trust deed. I am unable to follow the chain of reasoning by which the Lord President and Lord Adam arrived at the conclusion that, in a question with the trustees, the Crown lease of minerals was invalid. I can find no termini habiles upon which to rest that conclusion. The Lord President said: "How does it seem possible to separate the action of the trustees in regard to the unentailed lands from their action in regard to the entailed lands?" To the same effect, Lord Adam said: "I think it was not a valid lease as regards the coal in the entailed lands. And if it is not a valid lease as regards the coal in the entailed lands, it cannot stand as regards unentailed lands, as both are let as an unum quid." Now, according to the judgment of both the learned Lords, of which to that extent I approve, the Crown was, in February, 1875, free to let the sea minerals ex adverso of the entailed baronies of East Wemyss and Methil to the trustees or to any other tenant, because in the case of East Wemyss the Crown had excluded these minerals from the barony by a bounding charter; in the case of Methil there had been no prescriptive possession. The

trustees were admittedly owners of, and had the right to deal as they chose with, the fee of the unentailed lands of the barony of West Wemyss; and they had full and undisturbed possession of the sea minerals under the Crown lease. Whatever might be the right of the respondent, Mr. Wemyss, I do not think the trustees had any title to challenge their own transaction with the Crown. They must be held to have known the state of the title as well as if not better than the Crown, and they could not, in my opinion, set aside a transaction of which they had taken all the benefit they could on the ground that they were mistaken in supposing they had authority to act for the respondent, Mr. Wemyss, then a minor.

The learned judges have omitted to notice the fact that the mineral lease was taken in name of the trustees as tenants, upon the suggestion of the latter, and upon the representation that it was to be assigned by them to the respondent, Mr. Wemyss, on his attaining majority. The arrangement was not an unreasonable one, inasmuch as at that time the trustees were working sea coal opposite to their unentailed lands at West Wemyss, whereas no sea coal either had been or was being worked ex adverso of any other part of the united barony and lands of Wemyss. So far as the Crown was concerned, it is clear that the transaction was begun and completed upon the footing that all claim for the property of sea minerals, whether by the proprietors of the entailed or unentailed portions of the barony, was to be withdrawn. According to the evidence of the respondent, Mr. Wemyss, he took no part in the management of the entailed estate during his minority, but left it to his curators, and in particular to his mother, who naturally was the most active of them; and that lady made these arrangements with the Crown, which he now seeks to have declared inoperative or set aside, with the knowledge of the other curators, and with the advice of Melville & Lindesay, who were, as he says, "the trusted agents of the family."

Had the respondent Mr. Wemyss, upon his attaining majority, or within a reasonable period thereafter, repudiated the arrangement which had been made on his behalf in 1875,

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there seems no reason to doubt that he would have been entitled to do so. In 1879 he became the proprietor of the whole united barony and lands, and under the assignation from the trustees he also became tenant of the Crown in the sea-minerals ex adverso of the barony, which he continued to work in that capacity until the present action was brought, more than fourteen years afterwards. During the whole of that period he must be taken to have known that the Crown was asserting its right as owner to the sea minerals ex adverso of his barony and lands. He had distinct notice in the terms of his mineral lease that, at its commencement, the Crown had not stood in the position of owner, and that the Crown, in consideration of the lessees becoming its tenants, instead of exercising a proprietary right, had consented to forego its claims against the trustees and their tenants, who had, previous to the year 1874, asserted that they had the ownership of the sea minerals. He does not dispute that he was in possession of the titles to his estate, and had, therefore, the means of obtaining information at his command; but he seeks to excuse his long acquiescence by explaining that he was not aware that his titles gave him proprietary right to the sea minerals in question, and that his attention had never been directed to the point. I am not prepared to hold that the facts of the case bear out that excuse. I think it is a strong circumstance against the respondent Wemyss that, so early as February, 1890, he became aware that the Crown lease under which he held had been taken in 1875 because of the Crown having then disputed the efficacy of the barony titles to carry coal under the sea. He admits that at that time it was prominently before his mind that there had been old workings on the Wemyss estate under the sea; and that he "came to have the idea that I might have the right to the under-sea coal." Yet in April, 1890, he obtained a modification of the lease on the footing that the Crown, and not he, was the owner of the coal. I am of opinion that it was the plain duty of the respondent, having the means of information within his power, to investigate his right at once; and that he could not be permitted to go on for years without notice to the Crown of his intention to take the

whole benefit of the existing arrangement, and tacitly to reserve a right to challenge it at some future time. I must admit that in regard to this part of the case I had, at one time, more difficulty than my noble and learned friends; but, on consideration of the whole circumstances of the case, I see no reason to differ from their opinion.

I am, therefore, of opinion that the interlocutor appealed from, except in so far as it declares the right of the pursuers to the foreshore of the barony, ought to be reversed, and that the cause ought to be remitted to the First Division of the Court of Session, with directions to assoilzie the appellant from the whole other conclusions of the summons, and to find the Lord Advocate entitled to his expenses of process in both Courts below, and also his costs of the appeals.

LORD MORRIS. My Lords, I have only to express my concurrence in the opinion announced by my noble and learned friend, which so fully and completely deals with every point in this case.

LORD SHAND. My Lords, I have had, as your Lordships know, a full opportunity of considering the judgments of my late honourable and lamented noble friend Lord Herschell, and of my noble and learned friend Lord Watson, now on the Woolsack, and, as I agree entirely with the views which have been expressed in both of these judgments, I think it unnecessary and undesirable to enter again fully into the numerous questions which are raised and which have been discussed in this case.

I must, however, observe, with reference to the transaction of 1875 and the lease which was then entered into, which was adopted by the pursuer when he came of age and was acted upon for many years afterwards, that it seems to me their Lordships of the First Division have not given full effect to their own decision, that no right to the submarine minerals ex adverso of East Wemyss or Methil was ever conferred upon the Wemyss family, or belonged to the pursuer or to the trustees. If one considers for a moment the position of matters in 1874

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and 1875, when the negotiations between the trustees and the Crown took place, in the view that there was no right whatever in the Wemyss family to the submarine coal ex adverso of either East Wemyss or Methil, the matter stood simply thus: That the trustees, on the one hand maintaining that they had the property in the submarine coal ex adverso of West Wemyss, found the Crown disputing that right and claiming the property and threatening the trustees themselves, or those whom they represented, with a claim for bygone working which might have amounted to a large and serious responsibility. Those who represented the Wemyss family could not successfully maintain that they had a right to the submarine coal either of East Wemyss or of Methil; and they were therefore shut up to the single question, had they the right to the submarine coal in West Wemyss?

My Lords, no one who has traced the history of this litigation and judgment from beginning to end can fail to see that that was a most delicate question. It is one upon which their Lordships in the judgments now delivered have expressly refrained, now that the question has been so fully discussed, from giving any opinion except this—that they considered it to be a question of very great difficulty, and one which they were not prepared to decide in the pursuer's favour.

The position of the matter, therefore, in 1874 was this: that a delicate and difficult question being raised by the claim of the Crown that the minerals belonged to them, and the threat that there might be a bygone claim for past workings, the trustees, acting, I think, with a very wise discretion, opened negotiations with the Crown, stating, "We see there is a difficult question before us, and we are rather disposed, instead of having litigation, to avoid a decision of that question; and if you will give us a lease upon favourable terms for a period of time, we shall take such a lease, and thereby acknowledge the Crown as owner." By that they were not only getting the advantage of obtaining a lease on favourable terms and getting rid of this question of bygone claims, but they were also to have included in that lease for thirty-one years the submarine minerals of the adjoining baronies of East Wemyss and Methil, to which,

as has now been definitely found both by the Court of Session and by your Lordships, they had no right whatever. It appears to me that that was a transaction not only, so far as I can see, expedient, but most reasonable and prudent on the part of the trustees.

The trustees accordingly concluded an arrangement: they got, for the benefit of the estate, a lease of the submarine minerals in the adjoining baronies which they could not possibly have got otherwise, and they obtained the various advantages which I have mentioned. They proceeded to work all of these minerals, and did so for four or five years. Then came the point of time at which the pursuer himself took action. In 1879, four years after the lease was entered into, he came of age. The trustees had arranged that he should get what they considered the benefits of that lease, and in 1879 he acquired those benefits. He accepted an assignation of the lease, and intimated the assignation to the Crown, and became himself tenant of the whole of these minerals for a number of years afterwards. He worked those minerals, taking the benefit of the lease and all the advantages I have mentioned, until 1893, when this action was raised—that is, for a period of fourteen years. And, my Lords, not only so, but in 1879, shortly after he had acquired the lease, he obtained certain further advantages in his favour by arrangement with the Crown. In 1887 he got a reduction of the royalties; in 1890 he obtained other advantages, upon application, for the working of the minerals which enabled him to work mineral seams of greater thickness than he could have done under the original lease. As the case has been decided there was no unum quid in the sense used by the learned judges in speaking of the entailed lands, for the submarine coal ex adverso of these lands belonged to the Crown, who could let it to any one they chose just as it was arranged they were to let the coal of West Wemyss by the lease.

My Lords, I confess I have never had the slightest difficulty in holding upon the case as it was presented to this House that an arrangement was entered into which it was impossible in justice to the Crown to cut down by setting it aside or by a

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reduction. What is the ground upon which it is said that it should be set aside? It is said that it was only in 1890 that it occurred to Mr. Wemyss that he might make these larger claims, so many of which have proved to be without foundation. But, my Lords, what of the position of the other party to a contract of this kind? Had the Crown in dealing with persons who were sui juris, first with the trustees who had the power to enter into the lease so far as West Wemyss was concerned, and thereafter for fourteen years with one who was sui juris and capable of looking into and managing his own affairs—I ask, had the Crown any duty or obligation to inform him (even if they knew) that he might have higher rights? I take it that one must look at the position of the other contracting party in a question of this kind and not at Mr. Wemyss' position only. I have the strongest opinion that it was out of the question to cut down a transaction of this kind which has gone on for so many years simply upon a statement that Mr. Wemyss, who was bound to look after his own interest during all that time, did not until three years before the action was raised know that he might possibly have claims such as he has set up in this action. The Crown gave up, as I have stated, claims they might have made; again, they gave favourable terms on entering into the lease, by accepting a low royalty; they included in the lease coal to which the pursuer had clearly no right; they have repeatedly granted further concessions or modified terms; and the advantages given extended over a period of fourteen years, during which the pursuer was himself tenant. I am clearly of opinion that in those circumstances this compromise or arrangement could not be set aside; and I confess (though this is unnecessary for the decision of the case) that I am further of opinion that it was a very reasonable compromise and arrangement, for I am satisfied that a very great advantage was thereby gained by Mr. Wemyss.

My Lords, upon the larger questions which have been discussed I shall say very little. As to the property of West Wemyss, seeing that the plea in bar is to be sustained, it is not necessary to form an opinion whether the judgment of the Court of Session is or is not sound; but I shall only say for

myself, as I think my noble and learned friends have already said, I should have very great difficulty indeed in extending the doctrine applicable to the foreshore to the extent of covering submarine minerals lying outside the foreshore. I think the moment you get below the foreshore which is dry at low tide, and come to deal with minerals which are beyond that, the question you have to consider is a totally different one. I agree with what my late noble and learned friend Lord Herschell in his opinion has said—that if you have a mere conveyance of a barony it cannot possibly be maintained with any shew of reason that that conveyance would give a right to minerals not only in the foreshore (as to which even some acts of possession are required), but would give a right to minerals to seaward of the foreshore. I doubt if possession applicable to the submarine minerals below the foreshore could be taken to be an interpretation of an old grant so that the grant should have the effect of conveying those minerals further seaward, or if it could be carried further than merely giving effect to the adage or maxim, tantum prescriptum quantum possessum ; and I feel fortified in this doubt by what my noble and learned friend Lord Watson has said—that it is inconceivable that at the time when these old grants were given, centuries ago, it entered into the mind of any one that there should be workings of minerals, not merely on the foreshore, but out into the bed of the sea for a considerable distance. Such a thing certainly had not existed, and I do not suppose it was thought of.

My Lords, having expressed my views very shortly upon these latter questions, because they have been so fully discussed by my noble and learned friends in the judgments which have been delivered, upon the whole matter I have no difficulty in holding that the pursuers in this case are barred by the obtaining of the lease, and by what followed, and I may say, if it were by nothing else, are barred by the actings of the appellant Mr. Wemyss himself during the long time when he was himself tenant of the Crown of those minerals.

Ordered, That the interlocutor appealed from be reversed except in so far as it declares the

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right of the pursuers to the foreshore of the barony: That the cause be remitted to the First Division of the Court of Session with directions to assoilzie the Lord Advocate from the whole other conclusions of the summons: That the Lord Advocate as representing the Crown is entitled to his expenses of process in both Courts below: And further, that the respondents pay to the appellant his costs of these appeals.

Lords' Journals, July 31, 1899.

Agent for appellant: *T. W. Gorst, for T. Carmichael, S.S.C., Edinburgh.*

Agents for respondents: *Broughton, Nocton & Broughton, for Macpherson & Mackay, Edinburgh; and Wilkie, Youden & Bruce, Solicitors, Leven.*

[HOUSE OF LORDS.]

GREVILLE-NUGENT AND ANOTHER . APPELLANTS; H. L. (Sc.)
1899
AND
MACKENZIE AND OTHERS . . . . . RESPONDENTS. *Nov.* 20.

Minerals—Life-rent—Rents and Profits—"Opened" Mines.

By ante-nuptial contract of marriage dated 1882, in English form, G., the absolute owner of the estate of C., bound herself to convey, and did convey, her estate to trustees. The settlement contained the usual power of sale, and in the meantime the trustees were to lease the unsold parts, and to hold the net proceeds of such sales, as well as net rents and profits of the estate until sold, upon trusts thereinafter declared, "with such powers of leasing the lands and hereditaments and other powers necessary and expedient in the execution of the trust." The trusts were declared, and it was provided that until the estate should be sold the trustees were to apply the rents and profits to the persons and for the purposes to which the annual income of the money arising from the sale of the estate would be paid under the trust. Under the trust the annual income of the proceeds of the sale of the estate was to be paid to G. during her life, and after her death to her husband, and after their deaths the trustees were to hold the trust premises and the annual income thereof for the children of the marriage as the parents should appoint. There was one child of the marriage. Stone quarries on a portion of the estate had been worked at intervals for about a century; but during 1882, and for four years before 1882, no quarries had been worked. In 1895, the estate not having been sold, the trustees leased the stone in forty-five acres, including the portion already worked, at a fixed rent with a royalty on the amount of stone sold:—

Held, reversing the decision of the First Division of the Court of Session, that the quarries at the date of the marriage settlement were "opened mines," and the rent and royalty fell to be paid to G. as annual income from the estate, and did not fall to be accumulated for the benefit of the child of the marriage.

APPEAL from a judgment of the First Division of the Court of Session, Scotland, on a special case. (1)

The appellant, Mrs. Greville-Nugent, in contemplation of her marriage, bound herself by an indenture of settlement dated June 3, 1882, to convey to the trustees therein mentioned the estate of Cove in Dumfriesshire, to which she had succeeded on

(1) (1898) 25 R. 475.

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the death of her father. By the indenture of settlement, which was in English form, Mrs. Greville-Nugent, then Miss Ogilvy, and her intended husband bound themselves to execute a disposition in favour of the trustees of the estate of Cove upon trust, at the request of the spouses during their joint lives, and of the survivor during his or her life, and after the death of the survivor at the discretion of the trustees, to sell the estate of Cove; and in the meantime to lease the unsold parts, and to hold the net proceeds of such sale and the net rents and profits of the Cove estate until sale upon the trusts thereinafter declared. The trusts were then declared, and towards the close of the deed it was provided that until the estate of Cove shall have been sold the trustees should pay and apply the rents and profits to the persons and for the purposes to which the annual income of the money arising from the sale of the Cove estate would be paid or applied under the trust. Under the trust the income was to be paid to Mrs. Greville-Nugent for her sole and separate use during her life, and after her death to her husband, and after their deaths the trustees were to hold the said trust premises and the investments and accumulations (if any) and annual income thereof in trust for the children of the marriage as the parents should appoint, and in default of appointment equally. Mr. and Mrs. Greville-Nugent were married on June 5, 1882, and thereafter they in accordance with the marriage settlement conveyed the estate to the trustees. One child was born of the marriage, namely, Miss R. M. E. Greville-Nugent, one of the respondents. The trustees were the other respondents. The estate of Cove comprised about 545 acres, and the rental exclusive of mineral rents was 550*l*. The estate was acquired by George Ogilvy, the grandfather of Mrs. Greville-Nugent, at the end of the eighteenth century. During his lifetime he worked a stone quarry on the estate. His son succeeded to the estate in 1869 and died in 1871, the working of the quarries being suspended during his tenure. He, however, left a trust disposition, giving power to his trustees during the minority of his daughter, Mrs. Greville-Nugent, to grant leases of mines and minerals. During Mrs. Greville-Nugent's minority from 1871 to 1878 the quarries were

let by the trustees to mineral tenants and worked by them. In 1878, when the quarries for the time ceased to be worked, the extent of ground opened up was thirteen acres. Mrs. Greville-Nugent came of age in November, 1881, and at that time the quarries were not being worked. By lease dated June 11, 1895, the quarries were let by trustees to tenants at a fixed rent of 100*l.* a year, and a yearly royalty of one-twelfth of the price of the stone sold by the tenants, which royalty in 1896 came to about 255*l.* The extent of ground included in the lease was about forty-six acres, and included the before-mentioned thirteen acres. The special case was presented to determine who was entitled to the rents and royalties payable under the lease. They were claimed on the one hand by the trustees as being not income, but capital which they were bound to administer for Miss R. M. E. Greville-Nugent, the child of the marriage, and that Mrs. Greville-Nugent was only entitled to the interest thereon. On the other hand, the rents and royalties were claimed by Mrs. Greville-Nugent as being rents and profits of the estate to which she was entitled under the indenture of settlement. The First Division, by interlocutor dated January 25, 1898 (1), upheld the contention made on behalf of Miss Greville-Nugent.

Nov. 20. *A. Graham Murray, L.A.* (with him *A. S. D. Thomson* and *E. J. Elgood*) (the two former of the Scottish Bar), for the appellants. The authorities establish that the question whether the return from quarries in the name of rents and royalties is to be treated as income or capital is one of intention, the determining element in the absence of anything more specific being whether the quarries were opened or unopened at the inception of the trust: *Campbell* v. *Wardlaw*. (2) These quarries are not new mines. For nearly a hundred years they have been worked on and off; and for seven years during the minority of the settlor she received the rents of the quarries. The great depression in business after the failure of the City of Glasgow Bank accounts for the quarries not being worked after 1878. The quarries are all one field;

(1) 25 R. 475. (2) (1883) 8 App. Cas. 641.

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the present quarries being a development of the 1878 workings; and, further, the leased land is of no use as agricultural land. Express power to let the quarries was not necessary, the trustees having power to lease the unsold parts of the estate: 30 & 31 Vict. c. 97, s. 2, sub-s. 3. The marriage settlement is in form an English deed, and as a usual form of conveyance contains a power of sale: 2 Prideaux's Precedents in Conveyancing, 7th ed. 178, 17th ed. 257. The formal power of an early sale does not warrant the inference that the power of the trustees to let was limited either as to subject or duration. The learned judges of the Court of Session were unduly influenced by the fact that four years prior to the marriage deed the workings had been suspended. It is clear from the whole deed that the intention of the settlor was that the income from the quarries was to be treated as income receivable by her. [He also cited *Elias* v. *Snowdon Slate Quarries Co.* (1); *Bagot* v. *Bagot.* (2)]

Guthrie, Q.C. (with him *John Taylor Cameron*) (both of the Scottish Bar), for the respondent Miss Greville-Nugent. These quarries cannot be said to be "opened mines," because they were not opened or worked or leased by the settlor herself. The question is always one of intention; but where mines have been opened by an ancestor and the settlor does not deal with the profits, that goes to prove that the settlor did not intend to reserve the profits. [He cited *Campbell* v. *Wardlaw* (3) in the Court of Session; *Wardlaw* v. *Wardlaw* (4); Stair, 2, 3, 74; *Clegg* v. *Rowland.* (5)]

Thomas Tindal Methold, for the respondents, the trustees, mentioned *Clavering* v. *Clavering.* (6)

EARL OF HALSBURY L.C. My Lords, with the greatest respect to the learned judges who have decided this case in the Court below, I have not been able to follow the reasoning by which they have arrived at their conclusion. I rather conjecture that what the Lord Advocate has suggested has been the foundation of the judgment (indeed, it was stated by the

(1) (1879) 4 App. Cas. 454, 466.
(2) (1863) 32 Beav. 509.
(3) (1882) 9 R. 725.
(4) (1875) 2 R. 368.
(5) (1866) L. R. 2 Eq. 160.
(6) (1726) 2 P. Wms. 388.

Lord President to have been the foundation of his judgment)—that he thought the main purpose of the instrument was to create a power of sale—that is, that the form of English conveyancing had somewhat misled the learned judge as to what was the main purpose of the settlement. The machinery by which, in the event of there being children, the property should be equally divided between them being provided for by a power of sale so as to turn realty into personalty—because that is the substance of it—is a device familiar in the ordinary form to the English conveyancer; and I think the learned judge has been misled by that into assuming what he has more than once in the course of his judgment said—that the main purpose of the settlement was a sale, and all the other provisions were intended to be temporary. That has now been explained, and I observe that Mr. Guthrie has not dealt with that part of the argument at all, but has allowed it to pass without observation. Therefore I think we may dismiss that as being decisive of this case, one way or the other, and we must look to see what has been the intention of the parties to this settlement apart from any such considerations as arise from the power of sale.

Now, as to that proposition, which is the one which your Lordships are called upon to decide, it appears to me that it is covered by authority. There is given what includes both the mineral estate and the other estate, whatever there may be; and the question is what those words convey. Now, whatever might have been the case originally, and I am not prepared to defend the logic of some of the reasons given in the earlier decisions, at all events for obvious reasons—and I think if the Courts had the power by law to do it they were most useful and cogent reasons—they have treated in this class of case the produce of the soil as including that which is in truth what Lord Cairns has described as the substance of the soil itself. In speaking of coal, for instance, we talk constantly about the "rent" and "royalty" of coal. The phrases are figurative: you pay rent in one sense it is true; but rent generally has been understood to be a return from the soil, and not to be a consumption or taking away of the soil; whereas of course where the soil consists of coal and other minerals you are actually taking it

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away. But whatever may have been the original view of such questions, the matter has now become so perfectly well ascertained by a long course of decisions that wherever those general words are used and the question is whether the tenant for life is entitled to what, in one sense, is called the usufruct, but I suppose in more strict language would be called part of the soil itself—where you are dealing with minerals it has always been held, so far as I know, without doubt or question, for centuries that the proceeds of opened mines form part of that which may go to the tenant for life, and that he is entitled to take them as part of the proceeds of the soil. As I have said, I am not quite certain that if this matter were res integra, and if we were sent back 200 or 300 years, one would be quite able absolutely to follow all the reasoning by which that result is arrived at; but it is immaterial to do so now, because that point has been ascertained and adjudicated upon over and over again, and finally in this House.

That being the state of the law, now for the first time, so far as I am aware, a new limitation is sought to be placed on that principle, and the proposition comes somewhat in this form. In dealing with a settlement or a will the Courts have said that you must put in the words "opened mines" as being part of what is settled or bequeathed; by construction you are to put in those words; whether the words occur or not they are imported into it by the construction which the law has placed on instruments of that kind. Now for the first time it is suggested that the words "opened mines" are not sufficient to convey what the law assumes to be the state of things, and you must add to them "mines opened by the settlor or testator." The learned counsel for the trustees has given us a case in Peere Williams (1) which goes a good deal further; but I was prepared without that case to say that the suggestion is absolutely a novelty. In all the cases the question has always been, What is the thing bequeathed or settled? And if there are opened mines the consequence follows. The diligence and learning of Mr. Guthrie, which is certainly not likely to leave anything unsaid or unsearched for, has not been able to

(1) *Clavering* v. *Clavering*, 2 P. Wms. 388.

produce a single case in which any such question as that which he is now suggesting has ever been raised. I think it is true enough, as he has said, that in some of the cases he has referred to facts have existed which prevented such a point being raised, because in those cases the person who had opened the mines was the settlor himself; yet I think that is insufficient to establish a new point. No such question has ever been glanced at so far as I know, and certainly it would be an odd thing at this time of day if for the first time you were to put in such a limitation and to alter the law—I think it would be altering the law—and to say it is not sufficient to introduce into the language of such an instrument by construction the words "opened mines," but that you must add "mines opened by the settlor or testator."

My Lords, I am unable, therefore, to follow the reasoning of the Court below. It seems to me that that reasoning has been to some extent induced by their view of the form of the conveyance. Whatever the reason for it is, I am unable to agree with the judgment, and I move your Lordships that this interlocutor be reversed.

LORD MACNAGHTEN. My Lords, I entirely agree. I think the Lord Advocate was justified in saying that the learned judges in Scotland were misled by the form of this conveyance. The conveyance is really in common form. I will just refer to a note by Mr. Davidson in his book on Settlements. He says: "Whenever land is intended for division among the children of a marriage by far the most eligible mode of settlement is the creation of a trust for sale and declaration of trusts of the proceeds." Here the land was intended ultimately to be divided—at any rate, it was contemplated that it might be divided—between the children of the marriage, and accordingly the settlement is in that form.

When once that difficulty is removed, the case seems to me to be of the plainest possible kind. Here was a lady who was absolutely entitled to property which contained opened quarries. She settled it, reserving for herself for life the income of the property. Surely that included the income to be derived from

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these opened quarries. Apparently they were worked up to the year 1878. There was only a short interval between that time and the time of the lady attaining the age of twenty-one. Six months after she attained the age of twenty-one she married and made this settlement. It seems to me that she is clearly entitled to the income of these quarries.

LORD MORRIS. My Lords, I am of the same opinion.

LORD SHAND. My Lords, I also concur. The distinction apparently sought to be drawn by the respondents' counsel is that the provision of the deed of agreement or settlement shall not apply so as to give to a life-renter the full benefit of the profits or income of her own property, unless the mines were opened or worked by herself. I think there is no authority that can go that length. The case we have before us is apparently this: that mines which have been worked for a very considerable time in the hands of different people—worked, as the Lord Advocate put it, "off and on during a century"—were for a short period of four years only unworked. To hold as the result of this that, because these mines for some special reason were what Mr. Guthrie described as "dormant," for a temporary period, however short a period—not abandoned mines or mines which had not been worked for a very long period of time, and which therefore might be taken as abandoned—if the settlement was made during that period the proceeds of those mines are to go in a different way from what they would if the mines were then working, is, I think, unreasonable.

I am of opinion with your Lordships that these mines, although in a sense dormant mines—by which I mean mines the working of which had been for a time suspended, it may be because of a diminished price to be got for the mineral, or some other temporary cause—must be regarded as opened mines in the sense which the law has always attached to those words in questions like the present.

LORD BRAMPTON. My Lords, I am of the same opinion.

A. Graham Murray, L.A. The parties are agreed that the

costs should come out of the estate, but by "the estate" of course is meant the corpus of the estate, not the royalties in question.

EARL OF HALSBURY L.C. Well, the parties are agreed upon it.

Interlocutor appealed from reversed.

Lords' Journals, November 20, 1899.

Agents for appellants: *C. A. Elgood, for Pairman, Easson & Miller, S.S.C., Edinburgh.*

Agents for respondents, Miss Greville-Nugent, and Mackenzie, and another, trustees: *Bloxam, Ellison & Co., for Menzies, Black & Menzies, W.S., Edinburgh.*

[HOUSE OF LORDS.]

CORPORATION OF GLASGOW . . . APPELLANTS;

AND

M'EWAN . . . . . RESPONDENT.

Waterworks—"Heritor"—Church and Manse—Assessment of Way-leave—Scottish Act, 1663 (*c.* 21 *or c.* 31).

The Scottish Act, 1663 (c. 21 or c. 31): "Wher competent manses are alreadie built, ordaines the heritors of the paroche to releive the minister and his executors of all costs charges and expenses for repairing of the forsaids manses."

A conduit of the Glasgow Waterworks Commissioners was carried underground through lands in a parish in virtue of grants of way-leave in perpetuity, obtained from the proprietors of the land:—

Held, affirming the decision of the First Division of the Court of Session, that the commissioners were liable under the Act of 1663 to assessment in respect of their conduit as "heritors" of the parish for the repair of the manse.

APPEAL against an interlocutor of the First Division of the Court of Session, Scotland, dated February 3, 1899 (1), recalling an interlocutor of the Lord Ordinary (Lord Stormonth Darling), dated March 19, 1898.

(1) (1899) 1 F. 523.

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The question in the appeal was whether the appellants, the corporation of Glasgow, who were the Waterworks Commissioners of Glasgow, were liable to be assessed for the upkeep of the manse in the parish of Strathblane, in the county of Stirling, as "heritors" in the said parish under and in terms of the Scottish Act, 1663 (1), c. 21 in Lindsay's Acts, and c. 31 in the Scots Acts of the Record Commissioners. The respondent was the clerk to the heritors of the parish of Strathblane.

The appellants were proprietors of certain land in the parish of Strathblane which they held absolutely for various purposes connected with the Glasgow Corporation Waterworks. It was not disputed that in respect of these lands the appellants were heritors in the parish and liable to assessment as such; but the appellants also held certain rights of aqueduct or way-leave in the said parish under which they were entitled to transmit their water supply from Loch Katrine through portions of the said parish underground to Glasgow, and it was in respect of these rights the appellants were held to be liable to be also assessed. In the conveyance by Sir Archibald Edmonstone to the appellants, after reciting the special Act of the appellants, the way-leave is described as follows: "All and whole the heritable and irredeemable servitude right privilege and tolerance of a way-leave through," &c., "Declaring that the said servitude, right, privilege, and tolerance of way-leave through the said portion of land is hereby conveyed to my said disponees for the purpose of their opening up the surface of the land, and forming, constructing, and maintaining therein a culvert or conduit for conveying water to the city of Gasgow, and executing all necessary works in connection therewith, declaring always as it is hereby provided and declared that my said disponees shall be bound and obliged, after forming and constructing the said culvert or conduit, to restore satisfactorily the surface of the land; but they shall have liberty of access

(1) Act of 1663 (c. 21 or c. 31): "Wher competent manses are alreadie built, ordaines the heritors of the paroche to releive the minister and his executors of all costs charges and expenses for repairing of the forsaids manses."

thereto on all necessary occasions in all times coming hereafter for inspection, repairing, maintaining or altering the said culvert or conduit or any of the works connected therewith or adjacent thereto." Conveyances granted by other proprietors were in similar terms. The mode in which the servitude or way-leave was exercised was partly by a bore or tunnel driven through rock, partly by a tunnel lined with masonry, and partly by underground pipes, the whole of the bores and pipes being underground. The question in controversy was whether the appellants were rendered liable to assessment as "heritors" in respect to their interest in these way-leaves. It was not questioned in the appeal that, if liable at all, the appellants were liable according to the valuation roll. The contention of the appellants was that the term "heritor" in regard to ecclesiastical assessments had a definite meaning, namely, absolute or fee simple proprietor of land, and extended neither to persons holding interests in land by other than a property title, nor to persons holding subjects which, though heritable in quality and falling under the general description of heritage, are not land in the proper sense of the term.

The First Division of the Court of Session held that the appellants were liable to be assessed on the ground that, assuming that "heritor" and "owner of land or heritage" might be taken as interchangeable terms, yet that, inasmuch as the words "owner of land or heritage" used in various taxing statutes had received an interpretation wide enough to include a water company's interest in their pipes, or rather in the land occupied by their pipes, the same wide interpretation should be given to the term "heritor." (1)

Nov. 20, 23. *Haldane, Q.C.* and *Ure, Q.C.* (the latter of the Scottish Bar), for the appellants. The only question is whether the appellants' right to put the water-pipes in the ground renders them heritors under the Scottish Act, 1663—in short, what does the word heritor mean in that particular Act? The appellants say that the owner of the land is the man who gives the appellants the right of servitude,

(1) 1 F. 523.

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and that right of servitude is all the appellants have. There is no doubt that no one could have interfered with the appellants in the exercise of their right of servitude; but the question is, did possession of that right make the appellants "heritors" under this old Scottish Act? In substance, the right is not a right of heritage, but a right to impose a burden on the feudal right of the land. The appellants hold no heritable interest; their title is nothing but one of servitude; it is not disputed that for the limited purposes of their works they are entitled to the permanent and exclusive occupancy of the bore or tunnel through which the water runs. But to argue from this circumstance that they are "heritors" would be to make every person entitled to a servitude of aqueduct, or even of road across his neighbour's land which may happen to lie in a different parish from his own, a "heritor" in that parish. It has been decided that coal is not a heritable subject, and that a superior is not a heritor: *Traquair's Trustees* v. *Heritors of Innerleithen*. (1) Also, that a person entitled to landed estate only in life-rent is not a "heritor": *Minister of Morham* v. *Binston* (2); and *Anstruther* v. *Anstruther's Tutors*. (3) So also, that the owner of leasehold subjects—although his lease be practically at perpetuity—is not a "heritor": *M'Laren* v. *Clyde Navigation Trustees* (4): see also *Dundas* v. *Nicolson* (5); *Bruce-Carstairs* v. *Greig* (6); *Bell* v. *Wemyss*. (7) A coal-owner is not merely proprietor of the coal in the strata belonging to him, but remains proprietor of the space from which the coal has been substracted: *Graham* v. *Duke of Hamilton* (8); but neither the coal-owner nor any of the other owners of heritages above mentioned own "land" in the proper sense of the term.

The respondent relies on the cases of *Scottish North-Eastern Ry. Co.* v. *Gardiner* (9) and *Macfarlane* v. *Monklands Ry.*

(1) (1870) 9 M. 234, 250.
(2) (1679) Mor. Dict. 8499.
(3) (1823) 2 S. (1st ed.) 306; (2nd ed.) 269.
(4) (1865) 4 M. 58; affirmed (1868) 6 M. (H.L.) 81.
(5) (1778) Mor. Dict. 8511.
(6) (1773) Mor. Dict. 2333; affirmed (1775) Mor. Dict. 2335.
(7) (1805) Mor. Dict. voce Kirk, App. No. 3.
(8) (1869) 7 M. 976; reversed (1871) L. R. 2 H. L., Sc. 166.
(9) (1864) 2 M. 537.

Co. (1); but the appellants say these cases do not apply. The appellants obtained a special Act, but did not obtain the easements under their special Act, but under deeds, it being a cheaper way.

[They also referred to *Edinburgh Water Co.* v. *Hay* (2), *Metropolitan Railway* v. *Fowler* (3), and *Scottish Highland Distillery Co.* v. *Reid.* (4)]

A. Graham Murray, L.A., and *R. L. Blackburn* (both of the Scottish Bar), for the respondent, were not called upon.

EARL OF HALSBURY L.C. My Lords, in this case I believe that the question is a very short one, and, unless it is clouded with words which are supposed to bear a technical signification, it is to my mind a very plain one. The whole question turns in the first instance upon what is the meaning of the word "heritor" in the old Act of Parliament. Whatever may be the technical phraseology, and however it may be cut down by some archæological considerations of Scottish law, it is admitted at the bar on behalf of the appellants that at all events what we call proprietorship will bring the person who is the proprietor within the category of "heritors" under the ancient Act. That is the starting point upon which I found my judgment. I get rid, therefore, of technical phrases, and I want to know who is the proprietor of this piece of land.

My Lords, I say this piece of land because it is now agreed that the hollow tube filled with water, whether it is actually full or empty from time to time, is just as much part of the land as the adjoining soil. That also has been admitted; and now, that being admitted, the question comes whether the person who is the proprietor of that is Sir Archibald Edmonstone, who is the owner of all the adjoining land, or whether it is this legal creature, the company, which is incorporated for the purpose of supplying Glasgow with water.

My Lords, I entertain no doubt whatever as to who is the person who is the proprietor of it. If I am asked to say what

(1) (1864) 2 M. 519.
(2) (1854) 1 Macq. 682.
(3) [1893] A. C. 416.
(4) (1877) 4 R. 1118.

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is a proprietor, the definition may perhaps, like all definitions, be dangerous, because the person who is called upon to define is sometimes dealing with matters which are incapable of exact logical definition; but for all practical purposes one can see what a proprietor is by considering the incidents, and I must say that nothing appears to me to be more consonant with good sense than what the learned Lord President says in the course of his judgment, which indeed I read to one of the learned counsel at the bar in order that he might comment upon it: "I think the judges who decided these cases, if told by the House of Lords that a water company was an occupier of the lands in which its aqueduct was laid, would have looked round for the 'heritor' of these lands, and, having to choose between Sir Archibald Edmonstone, who is perpetually excluded from their enjoyment, and the defenders, who have the perpetual enjoyment of them, would certainly have chosen the defenders."

My Lords, I cannot help thinking that proprietorship, if you are to attempt to describe it, must necessarily include the right of possession, the right of user, not limited in point of time, and not in itself limited in point of use. I will deal in one moment with what is suggested to be the restriction upon the use; but, speaking generally, I should say that a person who is entitled to exclude everybody else, and who is himself entitled to possess and enjoy a thing, must be, in any ordinary sense of the term, the proprietor. I should have regarded the hypothesis put by the Lord President as an outrage upon common sense, to suppose that the proprietor can be a person who has no right to the possession, who cannot use the thing, and that the person who is entitled to enjoy and is entitled to use it for all time is not the proprietor. I regard those two propositions, correlative as they are, as exhausting really the subject-matter in debate.

But it is said you have not this incident of proprietorship—you have not the right to sell, you have not the right to dispose of the thing you have got to anybody else. But, my Lords, why not? It is not that there is any qualification or reservation to the original proprietor of it which entitles him

to have it back again if you do not use it; it is simply because the nature of the creature who by statute is permitted to have it and to keep it renders this creature incapable of using it for any other purpose than that for which the Legislature has incorporated that legal creature. That is no qualification of the right of proprietorship: it is a qualification of the mode in which the proprietor may dispose of it, or may use it, but it is no qualification in favour of the person to whom it originally belonged.

My Lords, I may say the substance of the argument has been rested upon the exact form of the conveyance. It has been said that it looks as if the persons conveying it had some notion that they were not conveying the absolute land, but were merely conveying some easement. For the purpose of this statute I do not care what was in the minds of the persons who drew that conveyance. The statute has made this part of the property of a legal creature, and the statute gives no right of reverter to the original proprietor. In some cases, as we know, in Railway Acts the statute provides that if the land is not used within a certain time for the purpose of the statute there shall be a right to the adjoining proprietors to repossess it. That is a right given by statute; but there is no such reservation here. There is no such qualification of the undoubted proprietary right of the water company to have that for which they have paid. Under these circumstances, it appears to me that the statute itself has made this thing, which is land itself and not a mere easement, the property of the water company for all time, and has for all time deprived the original proprietor of this thing.

Then, my Lords, seeing what the nature of that proprietorship is, it is suggested that nevertheless the owner of it is not a "heritor" under the statute. As I have said, the learned counsel at the bar who are familiar with such questions have admitted that if there is real and substantial proprietorship in this thing, whatever it is, that makes those who have that proprietorship "heritors" within the ancient statute. My Lords, I entertain no doubt that the appellants are in this case the real proprietors of this thing, and therefore they are

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"heritors" under the Act. I therefore move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion, and I must say I think the case is a very plain one.

Mr. Haldane asked your Lordships to confine your attention to the conveyance from Sir Archibald Edmonstone, and to construe it as a grant of a servitude of aqueduct merely. I do not think that is the true construction of the conveyance, and I think you are bound to keep in view the special Act of Parliament as well as the conveyance. The conveyance begins by reciting the Glasgow Waterworks Act. Then it conveys to the magistrates and council of the city of Glasgow, "according to the true intent and meaning of the Act," first certain lands, and in the second place "all and whole the heritable and irredeemable servitude right privilege and tolerance of a way-leave." But what was that granted for? The way-leave is granted to them "for the purpose of their opening up the surface of the land and forming constructing and maintaining therein a culvert or conduit for conveying water to the city of Glasgow and executing all necessary works in connection therewith." Now, when they have broken up the surface of the land, and when they have constructed therein these works which they are authorized to construct by this Act of Parliament, the Act, as it seems to me, makes this conduit with the space within it which has become part of the soil their absolute property for the purpose of their undertaking. They are the proprietors of it; and as such proprietors, it appears to me, they come within the category of heritors, and are liable to contribute according to the Act of 1663 towards the repairs of the manse.

LORD SHAND. My Lords, I am of opinion with your Lordships that the decision of the First Division of the Court of Session in this case ought to be affirmed.

The "heritors" under the statute of 1663 may, I think, be taken to mean the proprietors or owners of lands within the parish. The question raised in this case seems to me to be a special and a somewhat narrow one—namely, whether these

appellants are not such owners—i.e., owners of lands or heritable property, for the purposes of rating within the meaning of the statute. If they are owners or heritable proprietors, then they are liable; and the question, I take it, is whether they are not owners within the meaning of the statute, coming under the appellation of "heritors."

My Lords, I agree with the learned judges of the First Division in thinking that the important elements for the settlement of this question, which I regard as a rating question only, are these. In the first place, the appellants have acquired such rights as they possess by a heritable title: that title contains a clause consenting to registration in the Register of Sasines in Scotland, and by being so registered, as I have no doubt it was, it is a heritable title which has been feudalised. In the next place, it followed upon that title that they have a right to occupy the ground which they have filled in to a very large extent with bricks and masonry, culverts and pipes, and other subjects which became permanently built in or attached to the solum; and not only have they that right of occupation, but they have it as a perpetual right. This case is quite out of the class of cases which have been cited, in which temporary rights are given of a kind which plainly are not rights of heritable proprietors, but of tenants, life-renters and the like, because of their temporary nature. In the next place, the possession is not only perpetual; but, as the Lord Chancellor has observed, the right given is exclusive of the proprietor in his use of the ground,—interfering with the proprietor in so far as the comprehensive rights conferred upon the appellants give them powers over these lands.

My Lords, in that state of matters I entirely agree with the learned judges of the First Division when they say that in substance these appellants are the beneficial owners of the land.

My Lords, the argument submitted to your Lordships on behalf of the appellants, when it is examined, comes to this: "Whatever we may be in substance, if you look particularly into the nature of our title, you will see we are not really proprietors: we are only owners of a servitude." That may be, my Lords;

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but I think, for the purposes of rating, owners of what may be rightly called a servitude only, though they may be, yet, with all the additional qualities of their right which I have referred to, they are in substance for rating purposes the owners of the land. My Lords, I am not prepared to say that *in title* these appellants, according to the law of Scotland, are "owners." My opinion is rather that they are not so. They hold only a servitude, but it is a servitude which, with all that accompanies it, appears to me to be practically ownership in a question of rating. None of the learned judges in the Court of Session have said that the appellants' right would not be properly described as a servitude of aqueduct, and, while the title proceeds "for the purpose" of building culverts and tunnels, it seems to me that these words are merely the giving of powers of building and maintaining erections usual in grants of such a servitude. The question whether practical beneficial ownership is not given admits of illustration very shortly. It is put very clearly in the opinion of the Lord President (Lord Robertson). He put it in this way: Suppose that this property that is given in form as a servitude had been given by a conveyance of all the same particular ground in property, but in property so hampered and tied down by conditions that every one of these conditions which are now imposed upon the appellants had been imposed upon them by their title—that would have been substantially the same thing. They would have had a right of property, and so a right to enter upon and use the lands, but to use them for a limited purpose only, for precisely the same purposes for which they have power to use them now, and under the same restrictions. It would not have been possible to contest that in that case having a feudal title, though limited exactly in the same way as regards the right of occupation and use as it is now, that feudal title would make them proprietors; and, therefore, I say, as I have said in the course of the discussion, it appears to me that really the appellants' argument is founded on a technicality, the technicality being, "We have what by law is called a servitude"—to which the reply is that in substance there is proprietorship, because the appellants have the same advantage that they

would have if the property had been conveyed to them in property under those same conditions. The form of the title in most cases may be the determining element; but, though the title may in strict legal language be that of servitude, the substance of the right given may be beneficial ownership.

My Lords, Lord Cranworth L.C. in the case of *Hay* v. *Edinburgh Water Co.* (1) observed that it really becomes dangerous to be refining in matters of rating as to mere questions of the form of title. I think what we have got to look at is the substance of the rights which the parties have, and I agree with what the Lord President says at the close of the first part of his opinion. After enumerating the different points to which I have already referred, his Lordship concluded by saying: "The remaining question seems to me to be whether the perpetual and exclusive right to occupy land makes the holder of it in substance proprietor of that land, and if it does, then why not a heritor." My Lords, I agree with the view taken by Lord M'Laren—that a question of rating is in a totally different category from some of those questions which may arise between a proprietor and another to whom he has given a servitude. And I agree also with the view which Lord Kinnear has stated in reference to the case of Hay in the passage in which he quotes the observation of Lord Cranworth to this effect: "Even if this be an easement" (and that is the footing upon which I decide this case so far as I am concerned), "it is a heritage which I understand to mean a matter of property capable of inheritance. There can be no doubt in the world that, if I grant to another and his heirs the right for ever of conveying water from my lands, that is an heritage." My Lords, I entirely adopt the language which Lord Cranworth used as becoming applicable to this case, making this difference only—that for the word "heritage" I substitute "heritable subject" or property, which is sufficient for the decision of this case.

I shall only add that the tunnels, culverts, pipes, &c., built and fixed to the soil by the appellants are certainly rateable subjects. If the appellants are not liable to be rated for these, the proprietor of the estate must be so, though he has no

(1) 1 Macq. 682.

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beneficial ownership. He gave the appellants the rights they have for a capital sum of 50*l.*; and I confess it is a satisfaction to me that the decision which is now to be affirmed will avoid the injustice of rating on him an annual sum which might greatly exceed the sum which he got from the appellants for the heritable rights he conferred on them.

On the grounds I have stated, I agree with your Lordships in thinking that the decision of the First Division of the Court of Session should be affirmed.

LORD BRAMPTON. My Lords, I am so satisfied that I could not add one single word with utility to that which has fallen from the Lord Chancellor, that I prefer simply to say that I concur absolutely with the judgment that he has proposed.

Interlocutor appealed from affirmed and appeal dismissed with costs.

Lords' Journals, November 23, 1899.

Agents for appellants: *Martin & Leslie, for Simpson & Marwick, W.S., Edinburgh.*

Agents for respondent: *Grahames, Currey & Spens, for Dundas & Wilson, C.S., Edinburgh.*

[PRIVY COUNCIL.]

THE QUEEN . . . . . DEFENDANT.

AND

DEMERS . . . . . PLAINTIFF.

J. C.*
1899
Aug. 1;
Dec. 9.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Contract—Construction—Appeals from Judgment on Petition of Right.

Where the respondent contracted with the Government to execute for a term of years the printing and binding of certain public documents at stipulated prices, but the Government did not expressly contract to give to the respondent all or any of the said work:—

Held, that a stipulation to that effect could not be implied, and that there was no breach of contract by reason of orders for work being withheld.

An appeal lies to Her Majesty in Council from a decision of the Court of Queen's Bench on a petition of right.

APPEAL from a judgment of the Court of Queen's Bench (June 25, 1898), modifying a decree of the Superior Court for the Province of Quebec (Feb. 21, 1898).

The respondent by petition of right sued, under the circumstances stated in the judgment of their Lordships, to recover $85,000 as damages for breach of contract in respect of the printing and binding of certain public documents, substantially the *Official Gazette*, the Proceedings of the Houses of the Legislature, and the Statutes of the Province. The appellant resisted the claim on the grounds—(1.) that the contract sued upon was irregular, null and void; (2.) it was not binding under an Order in Council of January 27, 1897, which only authorized it subject to approval by the Lieutenant-Governor in Council, which approval had never been obtained; (3.) it was not authorized by any law or resolution of the legislative assembly, which had not voted any money in respect of it; (4.) a government has no power without legislative sanction to contract liability beyond the current fiscal year; (5.) the

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD DAVEY, and SIR HENRY STRONG.

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contract imposes no obligation to pay in respect of work not given to the respondent.

The Superior Court held that the contract could not bind the Crown for payment of money extending over future years without legislative sanction. The vote of supplies for printing passed in January, 1897, for that fiscal year, ratified the contract to that extent.

The Court of Queen's Bench, by a majority, held that the printing service and its cost being neither new nor unforeseen, but permanent and recognised by the legislature, and the habit being to make such contracts for terms of years, the making of the contract was matter of administration; although the legislature might if it chose interfere to control or rescind it. The Crown could not repudiate the contract without becoming obliged to indemnify the petitioner for his loss by the breach. The Court confirmed the damages granted below for the fiscal year, but reserved to the respondent his recourse for the future.

Blake, Q.C., Archambault, Q.C. (*Attorney-General for Quebec*), and *Robidoux, Q.C.*, for the appellant, contended that there was no contract. That declared upon never became operative or valid by reason of the absence of that approval by Order in Council, to which it was in terms made subject by the Order of January 27, 1897. No adjudication can be made against the appellant under the Petition of Right Act: see Revised Statutes of Quebec (1888), vol. ii. pp. 724 and 726, ss. 886 (A), 886 (O). Under the provincial constitution no power is vested in the appellant to make a contract involving the expenditure of public money beyond the fiscal year, in the absence of legislative provision for such power and for the necessary payments thereunder. Under the British North America Act, 1867, provincial revenues are placed under the control of the provincial legislature, formed into a fund, and appropriated by the legislative assembly to particular public services. There is no power to appropriate by the Government; it is exclusively by the legislature. Reference was made to s. 92, sub-ss. 2, 3, 5, 9; ss. 109, 118, 126; and to the provincial legislation in pursuance of the constitutional powers: see

Revised Statutes of Quebec (1888) ss. 735–743, 776–785, 799–802. The enactments bearing specially on public printing are Revised Statutes of Quebec (1888), ss. 157, 158, 725–729. No custom can be set up by the respondent either enlarging or derogating from these statutory terms. The contract, therefore, is void, or dependent on a legislative ratification which it never received. Moreover, if the contract is assumed to be valid, it imposed no obligation on the appellant to pay the respondent for work not actually given to him for execution; nor was it any breach thereof to withhold work from him.

Th. Casgrain, Q.C., and *Hume Williams, Q.C.*, for the respondent, contended that no appeal lay in matters of petition of right from judgments of the Court of Queen's Bench for Quebec. The remedy under petition of right was introduced by Quebec Act, 46 Vict. c. 27: see ss. 11, 14, 15, and 16. The Court below admitted that under that Act there was no appeal, but it held that because the Consolidating Act, R. S. Q. (1888), s. 5976, embodied the Petition of Right Act, it no longer remained a distinct statute, but became part of the Civil Procedure Code, and as such subject to the rule in art. 68 of the new Code of 1897. It was contended that the legislature intended to submit to the provincial courts matters in dispute between the Crown and provincial subjects; and to give to those provincial courts in such matters the power of final adjudication. Art. 68 is a general rule, and does not override art. 1024, which provides that after the judgment in provincial appeal the provincial treasurer must pay on a copy of the judgment being filed with him; in other words, that the judgment in provincial appeal is final.

The contract was valid, being made under authority of the Order of the Lieutenant-Governor in Council duly passed, acting on the advice of Ministers possessing the confidence of the legislature. It was authorized by statute and usage; at its date the legislature had voted supplies and grants for printing services up to June 30, 1898, and did not afterwards directly or indirectly disapprove the contract. The contract was entered into in the ordinary course of business: it was a

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matter of administration at the discretion of the executive, and did not require legislative sanction.

Dec. 9. The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In August, 1897, the respondent Demers, carrying on business in the city of Quebec as a printer under the firm of J. L. Demers et Frère, sued Her Majesty the Queen by a petition of right claiming $85,000 as damages for breach of a contract in respect of the printing and binding of certain public documents.

It seems that on January 27, 1897, the Lieutenant-Governor of Quebec had approved a report of the committee of council stating that the provincial secretary recommended that the work in question should be entrusted to the respondent's firm for a term of eight years, to run from January 1, 1897, at the prices which that firm had received for the same work since 1892, and that he should be authorized to sign a contract to that end subject as to its details to the approval of the Lieutenant-Governor in Council.

On March 18, 1897, a contract was signed purporting to be made between Her Majesty, represented by the provincial secretary authorized in that behalf by the Order in Council of January 27, 1897, of the first part, and the respondent Demers of the second part. The contract declared that the respondent covenanted to execute for Her Majesty the Queen during the term of eight years beginning from January 1, 1897, the printing and binding of the public documents specified in the body of the instrument, and that the contract was made for the prices and considerations expressed in the schedules and table annexed thereto.

No Order in Council was passed approving this contract or its details as contemplated by the Order of January 27. The Legislature of Quebec had been dissolved on February 27, 1897, before the contract was signed. The elections took place shortly afterwards. The Government was defeated and resigned, and on May 28, 1897, their successors came into office.

The fiscal year of the province ends on June 30. On

June 30, 1897, a report of the committee of council was approved by the Lieutenant-Governor stating that the provincial secretary had reported to the effect that the contract was not binding on the Government, and that he proposed that it should be cancelled.

The respondent was advised of the cancellation of the contract. No work was given to him after June 30, 1897. All the work executed by him up to that day was paid for according to its value as measured by the contract prices.

After protesting against the action of the Government the respondent presented his petition of right, which was duly fiated and filed on August 31, 1897.

In the Superior Court judgment was delivered by Larue J. on February 21, 1898. Holding that there had been a breach of contract on the part of the Government, his honour awarded damages against the Crown for the fiscal year 1897–98, for which year the vote of supplies for printing had been passed in January, 1897. But he dismissed the claim for damages in respect of the subsequent years on the ground that a contract made by the Crown for the payment of money extending over future years cannot bind the Crown in default of legislative ratification.

On appeal to the Court of Queen's Bench the learned judges delivered judgment on June 25, 1898. They confirmed so much of the judgment of the Superior Court as dealt with the damages for the year 1897–98, but varied the judgment by reserving to the respondent all his remedies as to the damages which might accrue to him for the later years of the contract.

The judgment of Larue J. and the judgments of the learned judges of the Court of Queen's Bench deal at some length with several questions of constitutional interest which were raised in the pleadings. Their Lordships do not propose to deal with these questions or with the question whether the alleged contract was of any validity without the confirmatory Order in Council contemplated by the Order of January 27, 1897. It appears to their Lordships that, assuming the contract to be a good and valid contract, the respondent has not shewn that there was any breach on the part of the Government.

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The contract purports to be made between Her Majesty the Queen, represented by the provincial secretary, and the respondent Demers. It does not purport to contain any covenant or obligation of any sort on the part of the Crown. The respondent undertakes to print certain public documents at certain specified rates. For all work given to him on the footing of the contract the Government was undoubtedly bound to pay according to the agreed tariff. But the contract imposes no obligation on the Crown to pay the respondent for work not given to him for execution. There is nothing in the contract binding the Government to give to the respondent all or any of the printing work referred to in the contract, nor is there anything in it to prevent the Government from giving the whole of the work, or such part as they think fit, to any other printer.

This point, which in their Lordships' judgment is fatal to the respondent's claim, was raised in the pleadings and apparently presented to both the Courts below. But it seems to have been lost sight of in the discussion of the more interesting questions which were debated in the course of the litigation.

A preliminary objection was raised by the respondent to the effect that no appeal lay to Her Majesty from the decision of the Court of Queen's Bench on a petition of right. This point was disposed of during the argument, and it is enough to say that it appears to their Lordships to be wholly untenable.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed, the decisions of the Court of Queen's Bench and the Superior Court reversed, and the petition of right dismissed with costs in both Courts.

The respondent must pay the costs of the appeal.

Solicitor for appellant: *S. V. Blake.*
Solicitors for respondent: *Capel Cure & Ball.*

[HOUSE OF LORDS.]

THE LONDON AND NORTH WESTERN RAILWAY COMPANY . . . . . } APPELLANTS; H. L. (E.) 1900 Feb. 13.

AND

WALKER AND OTHERS . . . . . RESPONDENTS.

Railway—Minerals—Notice of Intention to Work—Compensation—Arbitration—Duty of Company to take up Award—Lands Clauses Consolidation Act 1845 *c.* 18 *s.* 35.

A railway company, having (though under protest) appointed an arbitrator and joined in the arbitration under the Lands Clauses Consolidation Act 1845 in respect of a claim for the purchase of minerals, must take up the award and furnish a copy to the claimants in accordance with s. 35 of the Act; and a mandamus may be granted to compel them. The validity of the award may be contested later.

The decision of the Court of Appeal, [1899] 1 Q. B. 921, affirmed on this ground.

THE respondents, owners of minerals under and adjoining the appellant company's railway, having given the company notice of their intention to work the minerals, the company gave the respondents notice of their intention to purchase part of the minerals. The respondents then gave the company notice that they claimed a certain sum for the purchase and a further sum for injurious affection and required the compensation to be settled by arbitration under the Lands Clauses Consolidation Act 1845. The respondents appointed their arbitrator and called upon the company to appoint theirs. The company objected on the ground that the assessment of the compensation was regulated by a special Act of the company of 1833, and not by the Lands Clauses and Railways Clauses Consolidation Acts, but eventually appointed an arbitrator under protest and while repudiating the jurisdiction of the arbitrators. The arbitrators not being able to agree in the choice of an umpire, the Board of Trade appointed an umpire in accordance with the Lands Clauses Act. The company appeared at the arbitration under protest, and asked the umpire

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to make an alternative award under the Act of 1833, contending that he had no jurisdiction under the Lands Clauses Act. The umpire refused to do so. When the umpire made his award the company refused to take it up and the respondents obtained a rule nisi for a mandamus. The rule was made absolute by Wills and Kennedy JJ. for a mandamus to the company to take up the award and to furnish a copy to the respondents. This decision was affirmed by the Court of Appeal. (1) The point decided by the Court of Appeal that the arbitration was regulated by the Lands Clauses Act and not by the special Act was not decided by this House.

Sir E. Clarke Q.C. and *Page Q.C.* (*Underhill* with them) for the appellants contended that the umpire had no jurisdiction and that a mandamus would not lie and referred to the cases cited in the Court below (2); but it having been admitted during the argument that the railway company had appointed their arbitrator under the Lands Clauses Act—

Cohen Q.C., *Dugdale Q.C.*, *W. J. Noble* and *Pease*, for the respondents, were not called on.

EARL OF HALSBURY L.C. My Lords, it seems to me that the course pursued by the railway company has been misconceived. The duty is a plain duty under the Act of Parliament if it was an arbitration under the Lands Clauses Act. The question of whether or not the subject-matter of discussion at the arbitration was properly entered into, and whether or not the rights of the parties are regulated by the earlier or by the later statute, seems to me to be irrelevant to the question now before your Lordships. The question here is whether there was an arbitration properly constituted under the provisions of the Lands Clauses Act. If there was, the Act specially enacts that under such circumstances the railway company shall take up the award. It does not conclude the rights of the parties. When the award has been taken up, any objection to the award which can by law be made can then be made in an action upon the award; but at this preliminary stage, how are

(1) [1899] 1 Q. B. 921. (2) [1899] 1 Q. B. at pp. 931, 932.

your Lordships to say that the Act of Parliament does not apply? Of course, if it could be made out that this was a proceeding coram non judice, it might well be that your Lordships would not enforce the duty which is by the statute cast presumably only upon those who have engaged in a proceeding which is, primâ facie at all events, a valid one. Here it has been admitted in the frankest possible manner, and I think quite rightly admitted, that the umpire appointed by the Board of Trade was rightly appointed, and that, he being rightly appointed, the proceedings before him were perfectly regular.

The effect of having made a protest, whatever that effect is, may, for aught I know to the contrary, be available hereafter to the parties; but it is impossible not to see that the very reason why they agreed to appoint (although under circumstances which appear to me to have been only calculated to create further expense) was this. They said, "If we do not appoint, the question will arise in this acute form that they will proceed against us ex parte, and, of course, their own arbitrator is very likely to give them very large damages." That is what moved them to do it, and for the express purpose, therefore, of preventing the other side from proceeding ex parte they did that the very doing of which assumes its validity because it assumes the effectual bar to the proceeding ex parte. They cannot have it both ways. Either it was a valid appointment so as to prevent the ex parte proceedings, or it was not a valid appointment. They did prevent the ex parte proceedings, and I think, at present at all events, whatever may hereafter happen, we must assume it was validly done. Indeed, as I have said, it has been admitted by the learned counsel with great candour and propriety that it was a valid appointment and a valid arbitration. Why are your Lordships now to interfere to prevent that which the statute says shall be the consequence of such an arbitration, and of an award made under that statute? My Lords, I am really unable to give any answer to that question.

With all respect to Collins L.J., he appears to me not to have really dealt with the point at all. I do not know whether

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he had the same candid admission before him as your Lordships have had to-day, but he appears to have treated it (and at one time there was some reason to suppose some of your Lordships took that view) as if it was entirely without jurisdiction, and, if so, of course a different question would arise; but it cannot be assumed now that it was without jurisdiction, and if there was jurisdiction, there is the award and there is the statutable duty to take it up. Now, whatever may be the rights of the parties hereafter, your Lordships are entertaining the comparatively immaterial question whether or not the fees of the umpire should be paid in order to decide important rights between these two parties. But that has no relation, at all events, to the plain duty created by the Act of Parliament under the circumstances with which your Lordships are dealing.

I therefore move your Lordships that this appeal be dismissed with costs and the judgment affirmed.

LORD MACNAGHTEN. My Lords, I am entirely of the same opinion. When once it is admitted that, notwithstanding the curious and cumbrous form in which the railway company appointed their arbitrator, they did really intend to join in an arbitration under the Lands Clauses Consolidation Act, it seems to me that the statutory consequence must necessarily follow, and that they must take up this award. It will not prejudice their rights when they come to litigate the question after they know what the award is. If they desire to raise any question, it will be perfectly open to them to raise it hereafter. Whether they might at an earlier stage have applied for an injunction to stay the proceedings, it is not necessary to consider.

LORDS MORRIS, SHAND, JAMES OF HEREFORD, and BRAMPTON concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, February 13, 1900.

Solicitor for appellant: *C. H. Mason.*
Solicitors for respondents: *Whitfield & Harrison.*

[HOUSE OF LORDS.]

THE OWNERS OF THE STEAMSHIP "MEDIANA" . . . . . } APPELLANTS;

AND

THE OWNERS, MASTER AND CREW OF THE LIGHTSHIP "COMET" . } RESPONDENTS.

THE "MEDIANA."

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Admiralty—Collision—Damages—Loss of Use of Lightship—Remoteness of Damage.

A lightship, belonging to a harbour board and used for lighting approaches, was damaged in a collision caused by the negligence of the appellants. The place of the damaged lightship was during her repair taken by another lightship belonging to the board and maintained at an annual expense for the purpose of such an emergency:—

Held, that the board was entitled to recover from the appellants not only the out of pocket expenses caused by the collision, but also substantial damages for the loss of the services of the damaged lightship during the time her place was taken by the substituted lightship.

The Greta Holme, [1897] A. C. 596, held applicable.

The decision of the Court of Appeal, [1899] P. 127, affirmed.

THE Mersey Docks and Harbour Board, who as owners of the lightship *Comet* were respondents, are by statute charged with the duty of lighting the approaches to the river Mersey. There are four stations to be lighted, and, for the purpose of carrying out the work, the Mersey Docks and Harbour Board own six lightships, four of which are always in use, and a fifth is kept to replace the lightships as they are brought in for overhaul. A sixth (the *Orion*) lies moored in the Mersey ready to take the place of any one of the four lightships in case of special emergency, such as damage by collision or other accident. On April 23, 1898, the steamship *Mediana*, belonging to the appellants, came into collision with, and sank, the *Comet*, one of the lightships. After the collision the *Orion* was towed out to take the place of the *Comet*, and was so engaged for seventy-four days, during which period she was not required for any other purpose. The appellants

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admitted liability, subject to a reference to the Liverpool District Registrar to assess the damages.

The respondents brought an action in the Admiralty Division against the appellants, and filed a claim consisting of eight items, the first seven covering all the actual out of pocket expenses (for removing and repairing the *Comet* and moving the *Orion*, &c.) to which the respondents were put: these were not disputed. Item 8 was as follows: "Loss of the use of the lightship *Comet*, or hire of the services of the lightship *Orion* on the station from April 23 to July 6, 1898—seventy-four days at 4*l*. 4*s*.—310*l*. 6*s*." The expense to the board of maintaining the sixth lightship, including interest on capital invested in her, amounts to about 1000*l*. per annum. During the last twenty-five years there had been twenty-three cases of damage by collision, in eleven of which it had been necessary to replace the lightship by the one kept in readiness in the river, and during the same period there had been four cases in which it had been necessary to withdraw one of the lightships in consequence of damage occasioned by heavy weather, and not by collision.

The appellants disputed their liability in respect of item 8, but agreed to the sum of 310*l*. 6*s*. if the board was entitled to anything under that head.

The registrar allowed all the items. Phillimore J. disallowed item 8. The Court of Appeal (A. L. Smith and Collins L.JJ.) reversed this decision and confirmed the registrar's report. (1)

Feb. 12. *Joseph Walton Q.C.* and *Horridge* for the appellants. The respondents cannot recover substantial damages for the loss of the use of the *Comet*. A plaintiff is bound to mitigate not aggravate the damages, and the respondents' duty was to substitute the *Orion* for the *Comet*. The *Orion* was lying idle and they were not put to additional expense by the use of her. *The Greta Holme* (2) differed from the present case: there was no substitute dredger, the work of dredging was delayed, and silt was accumulated. In the present case the respondents are better off than if no accident had happened:

(1) [1899] P. 127. (2) [1897] A. C. 596.

they have paid nothing for the hire of a substitute, and they are in pocket over 300*l.* towards the annual expense of the *Orion*. This is not a case of trover or detinue in which damages may be given on grounds not applicable here. In every case the question is what is the real loss to the plaintiff, and the actual circumstances must be looked at. The mere fact of unlawful injury does not entitle a plaintiff to substantial damages. The loss of use of the *Comet* (apart from the out of pocket expenses which are admitted) gave rise to no claim for actual damages. The case falls not under *The Greta Holme* (1) but under the class of cases considered and followed by Phillimore J. in the Court below (2); and see *The City of Peking*. (3)

Carver Q.C. (*Aspinall Q.C.* and *Maurice Hill* with him) for the respondents was heard only as to whether the point raised in this appeal was raised and decided in *The City of Peking*. (3)

Feb. 13. EARL OF HALSBURY L.C. My Lords, I think that this case is really governed by the principles laid down in this House in the case of *The Greta Holme* (1), and I therefore agree with the Court of Appeal and move your Lordships that this judgment be affirmed.

My Lords, it is true that in that case there were two circumstances which I mention for the purpose of pointing out that I do not omit to consider them, namely, that the dredger was actually prevented from doing work which the particular corporation entrusted with the duty of doing it had intended it to do; and further, as was pointed out by Lord Watson, the effect of not dredging during the period while the dredger was rendered incapable of doing its proper work was to set up an additional amount of silt which would itself of course be an injury which would properly sound in damages when the person responsible for taking away the dredger was called upon to pay. These two circumstances were not unnaturally pointed out by the learned counsel who challenged this judgment as

(1) [1897] A. C. 596. (2) [1899] P. at pp. 129–134.
(3) (1890) 15 App. Cas. 438.

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shewing that there were grounds for the decision in that case which do not apply here. But, my Lords, I think it is impossible to read the judgments of those noble and learned Lords who took part in that case without seeing that it rests upon a much wider and broader principle than would be applicable to the particular circumstances which I have referred to in that case. Lord Herschell in terms did lay down a much broader principle, and I may say that I myself intended to lay it down, though I may have expressed myself imperfectly, namely, that where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages.

And, my Lords, here I wish, with reference to what has been suggested at the bar, to remark upon the difference between damages and nominal damages. "Nominal damages" is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term "nominal damages" does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages. Of course the whole region of inquiry into damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages; nevertheless it is remitted to the jury, or those who stand in place of the jury, to consider what compensation in money shall be given for what is a wrongful act. Take the most familiar and ordinary case: how is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact amount of money which would

represent such a thing as the pain and suffering which a person has undergone by reason of an accident. In truth, I think it would be very arguable to say that a person would be entitled to no damages for such things. What manly mind cares about pain and suffering that is past? But nevertheless the law recognises that as a topic upon which damages may be given.

Now, in the particular case before us, apart from a circumstance which I will refer to immediately, the broad proposition seems to me to be that by a wrongful act of the defendants the plaintiffs were deprived of their vessel. When I say deprived of their vessel, I will not use the phrase "the use of the vessel." What right has a wrongdoer to consider what use you are going to make of your vessel? More than one case has been put to illustrate this: for example, the owner of a horse, or of a chair. Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me to be absurd; but a jury have very often a very difficult task to perform in ascertaining what should be the amount of damages of that sort. I know very well that as a matter of common sense what an arbitrator or a jury very often do is to take a perfectly artificial hypothesis and say, "Well, if you wanted to hire a chair, what would you have to give for it for the period"; and in that way they come to a rough sort of conclusion as to what damages ought to be paid for the unjust and unlawful withdrawal of it from the owner. Here, as I say, the broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing that was taken, except—and this I think has been the fallacy running through the arguments at the bar—when you are endeavouring to establish the specific loss of profit, or of something that you otherwise would have got which the law recognises as special damage. In that case you must shew it, and by precise evidence, so much so that in the old system of pleading you could not recover damages unless you had made a specific allegation in your pleading so

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as to give the persons responsible for making good the loss an opportunity of inquiring into it before they came into court. But when we are speaking of general damages no such principle applies at all, and the jury might give whatever they thought would be the proper equivalent for the unlawful withdrawal of the subject-matter then in question. It seems to me that that broad principle comprehends within it many other things. There is no doubt in many cases a jury would say there really has been no damage at all: "We will give the plaintiffs a trifling amount"—not nominal damages, be it observed, but a trifling amount; in other cases it would be more serious.

It appears to me, therefore, that what the noble and learned Lords who gave judgment in your Lordships' House intended to point out, and what Lord Herschell gives expression to in plain terms, was that the unlawful keeping back of what belongs to another person is of itself a ground for real damages, not nominal damages at all. Of course I observe that it has been suggested that this was not an action for trover or detinue; but although those are different forms of action, the principle upon which damages are to be assessed does not depend upon the form of action at all. I put aside cases of trespass where a high-handed procedure or insolent behaviour has been held in law to be a subject of aggravated damages, and the jury might give what are called punitive damages. Leaving that aside, whatever be the form of action, the principle of assessing damages must be the same in all Courts and for all forms of what I may call the unlawful detention of another man's property.

My Lords, that seems to me to be so plain that I confess I have been somewhat puzzled to learn that it has been decided in the Admiralty Courts that the loss of the use of a vessel under the circumstances of this case has been treated (if it has really been so treated I have serious doubt about it) as something for which no moneys counted could possibly be allowed. I can only say that I am very glad such a principle has not been affirmed by your Lordships' House, because it seems to me to be inconsistent with principle and very unreasonable in itself.

My Lords, the only difficulty I have had in this case has been in regard to the case in the Privy Council (*The City of Peking*. (1)) I think, with some labour, I have discovered the clue which guided the learned judges in coming to the conclusion that they did. It is to be observed in the first place that there is a difficulty in understanding that case without the reports of those persons who had to assess the damages—it was the registrar, not a jury; and the report certainly is not a model of clearness so far as it is quoted. It is very difficult, indeed, to understand the judgment without having the report before one, but I think I have discovered the clue to the judgment which was arrived at. At page 447 of the report I find this as part of the judgment: "It would be very unjust to charge the defendant 95*l.* a day or anything for the loss of the use of the *Saghalien* during her detention at Hong Kong for the time during which the *Melbourne* and her crew were doing" (this is I think the clue to the whole story) "at the defendants' expense the work which the *Saghalien* and her crew ought to have done." I have not been able sufficiently to disentangle the facts to say whether that included anything for the use of the vessel or not; but the principle upon which they decided it was that the defendants were themselves chargeable and paid for the use of the *Melbourne* in place of the other vessel—that it belonged as a matter of fact to the plaintiffs is immaterial. The principle of the decision, as I gather it from that passage, is that the defendants had already paid for the use of it and for the use of the crew and for the navigation of it, and therefore if during that period when the defendants were actually called upon by the registrar's report to pay for the use of the *Melbourne* they had had to pay 95*l.* a day also for the detention of the *Saghalien*, it is very obvious that they would have been paying twice over, and therefore not unnaturally, I think, the Court came to the conclusion in that case, not as a principle of law at all but as applicable to the particular facts of that case, that, to put in plain terms what I understand to be the effect of the judgment, you cannot have damages for that detention because you have already got paid for the use

(1) 15 App. Cas 438.

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of the substituted vessel in the form of the damages that the registrar has assessed. If that is the principle of the case, of course it is not inconsistent with, but, on the contrary, on the same lines with the judgment which the Court of Appeal has given in the present case. Whether the question was raised or not of the absolute use of the vessel as distinguished from the payment of the crew and all the other things that were included in the lump sum in the registrar's report, I am not able to say. Happily we have present to-day one of the noble and learned Lords who took part in that judgment, and he will probably be able to tell your Lordships whether that question was raised or not. Undoubtedly it is not raised in the report at all, but, as I say, the clue to the judgment is what I have already pointed out, and therefore, to my mind, that decision presents no difficulty at all in arriving at the conclusion I have indicated, namely, that this judgment ought to be affirmed; and I therefore move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I think this case comes well within the principle of decision in *The Greta Holme* (1), and on that I do not propose to add a single word. But as I happen to have taken part in the decision of *The City of Peking* (2) in the Privy Council, I will say a few words about that case. I do not pretend to have a very accurate recollection of the argument, but I have endeavoured to refresh my memory, and as far as my recollection goes the question at issue in this case was not raised there. Certainly it was not raised directly, and I do not think it was presented to the Court at all. In that case both the parties accepted up to a certain point the ruling of Dr. Lushington in the case of *The Black Prince*. (3) The only question was whether Dr. Lushington's ruling upon the particular facts was applicable to *The City of Peking*. (2) In *The Black Prince* (3) substituted service was provided, but the substituted service was not a benefit to the persons injured by the collision, but to

(1) [1897] A. C. 596. (2) 15 App. Cas. 438.
(3) (1862) 1 Lush. 568.

a different shipping company. In the case of *The City of Peking* (1) the parties admitted that substituted service was provided at the expense of the wrongdoers, the Peninsular and Oriental Company, and that there had been no loss of profit whatever. Under those circumstances they claimed an extravagant amount of money in respect of demurrage simply upon the authority of *The Black Prince Case*. (2) They asked for nothing less. They asked for the whole sum as demurrage upon a vessel of that tonnage on the strength of the judgment of Dr. Lushington in *The Black Prince*. (2) Their Lordships had no hesitation in rejecting that claim, because, as my noble and learned friend has said, that would have been paying them twice over. I really do not think the point now at issue was raised in *The City of Peking* (1), and I observe that that case was not cited in the Court of Appeal on either side or mentioned in the judgment.

LORD MORRIS. My Lords, I am of the same opinion. I am clearly of opinion that this case comes within the principle asserted by this House in the case of *The Greta Holme* (3), which I am equally clearly of opinion overruled the decision of the previous cases as regards the mode of the assessment of damages.

LORD SHAND. My Lords, I will only add a few words in expressing my entire concurrence in the decision about to be pronounced by this House.

There is no question of amount here involved, because the parties are agreed by the case that if any amount of damages is to be given the sum to be awarded is 300*l.*

On the principle to be applied to the case, I think it important to notice what is observed by A. L. Smith L.J., that there was a finding in the case by the registrar that this sixth lightship was kept at an expense of about 1000*l.* a year. The ship *Orion* was kept, therefore, as it appears from the report, expressly for the purpose of meeting such an emergency as this,

(1) 15 App. Cas. 438. (2) 1 Lush. 568.
(3) [1897] A. C. 596.

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and it appears from the report itself that on no less than eleven occasions in twenty-five years a substitute has been called for and used in the case of a lightship being run down. In those circumstances it appears to me that if the commissioners had hired a ship for the purpose of doing duty as a sixth lightship, finding that necessary in the course of their administration, there could have been no answer to their claim for the cost of hiring that ship. It appears to me that if there could have been no answer in that case, as little is there any answer here. Instead of waiting for an emergency suddenly occurring, they have thought fit to have a ship ready. It costs them 1000*l.* a year to have it ready. It appears to me that the expense of having this ship ready instead of having to look for a ship when the emergency occurs, or rather a part of that expense, must properly fall upon the person who has been guilty of running down the lightship.

I am therefore of opinion that the judgment ought to be affirmed.

LORD JAMES OF HEREFORD. My Lords, I entirely concur in the judgment moved by the Lord Chancellor, and I will only add that I think there is a distinction between the case now at the bar and the case determined in the Privy Council, arising from the fact that in this case there has been expense incurred in providing the very remedy supplied in order to get rid of the effect of the act of the wrongdoer, whereas in *The City of Peking Case* (1) there was no expense incurred in order to remedy the injury. All that was done was to use a particular vessel that was already in existence without adding to the cost of the existence of that vessel. I think that is an additional ground for distinguishing the case in the Privy Council from the present case.

LORD BRAMPTON. My Lords, I am of the same opinion. I concur entirely in the judgment which has been pronounced by the Lord Chancellor in, I think, much better language than that in which I could have expressed it myself. One word

(1) 15 App. Cas. 438.

however, I desire to say with regard to the *Orion*, which was the substituted vessel in this case. She had been built by the respondents and was maintained by them at great expense in order that as between themselves and the public they might have ready means at their command to obviate the great danger and inconvenience which might arise from such a misfortune as befell the *Comet* by the negligence of the appellants ; but as between themselves and the wrongdoer causing the damage to the *Comet* they were under no obligation whatsoever to use the *Orion* at all. They might have used a hired vessel had they so pleased, in which case the liability for the hire would have been clear. But the respondents prudently, having a vessel suited for the purpose lying idle, thought it right in their discretion to use her instead of hiring perhaps a less efficient substitute for the *Comet*. The services of the *Orion*, however, were valuable, and why should the appellants claim to have them gratuitously, including the wages of the men who might have been employed on board her ? They might equally claim gratuitously to have the services of skilled workmen—engineers hired by the year and paid by the respondents—who happened at the time to be idle, or to have no particular work in hand. That cannot be, and in my judgment is not, the law. In my opinion the value of the services ought to be paid as a compensation for the damage which accrued to the respondents by reason of the detention of their vessel under the circumstances. I concur, therefore, in thinking that this judgment ought to be affirmed with costs.

Judgment appealed from affirmed and appeal dismissed with costs.

Lords' Journals, February 13, 1900.

Solicitors for appellants: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for respondents: *Rowcliffes, Rawle & Co., for Squarey, Liverpool.*

[HOUSE OF LORDS.]

H. L. (E.) 1900 Feb. 15.

EARL GREY . . . . . APPELLANT;

AND

THE ATTORNEY-GENERAL . . . . RESPONDENT.

Revenue—Estate Duty—Settlement—Gift—Exclusion of Benefit to Donor—Finance Act 1894 *c.* 30 *s.* 2 *sub-s.* 1 (*c*).

By deed in 1885 real and personal estate was given by the owner to the appellant subject to an annual rent-charge issuing out of the realty, the appellant covenanting to pay the rent-charge and all the funeral and testamentary expenses and all the donor's debts at his death to the full exhaustion of all his property. In the event of the appellant's death in the donor's lifetime or of any breach of covenant by the appellant the donor had power to revoke the deed wholly or in part: any revocation to be without prejudice to any purchase or mortgage made before the revocation. The donor released the rent-charge and power of revocation by deed in September 1894 and died in October 1894:—

Held, that benefits having been reserved to the donor, estate duty was payable upon all the property comprised in the deed of 1885 as property passing upon the death of the donor within the meaning of the Finance Act 1894 ss. 1, 2 sub-s. 1 (*c*).

The decision of the Court of Appeal, [1898] 2 Q. B. 534, affirmed.

BY deed in 1885 between the late Earl Grey and the appellant the late Earl out of natural love and affection conveyed real estate, leaseholds and personalty to the appellant to the use that the late Earl Grey should receive during his life an annual rent-charge of 4000*l.* issuing out of the hereditaments (other than the mansion-house and appurtenances): and that he should be permitted to occupy the mansion-house, its effects and appurtenances at Howick during his life. The appellant covenanted (inter alia) to pay certain annuities and mortgage and other debts: to pay the annual rent-charge of 4000*l.*: to pay at the late Earl's death all his funeral and testamentary expenses and all his debts to the full exhaustion of all the property real and personal of the late Earl. In the event of the appellant's death in the late Earl's lifetime or of any breach of any covenant by the appellant it should be lawful for the late

Earl to revoke the deed wholly or in part, but save in the event aforesaid the deed was irrevocable. Provided that any revocation under the power should be without prejudice to the title of any purchaser or mortgagee from the appellant under a sale or mortgage made previously to the revocation.

By deed of September 26, 1894, in consideration of 5000*l.* paid to him by the appellant the late Earl released the rent-charge and the power of revocation.

The late Earl died on October 9, 1894, and the Crown claimed by information estate duty under the Finance Act 1894 upon the principal value of all the property real and personal comprised in the deed of 1885 as property passing upon the late Earl's death within the meaning of ss. 1 and 2 sub-s. 1 (*c*) of the Act, and having regard to s. 38 of the Customs and Inland Revenue Act 1881 as amended by s. 11 of the Customs and Inland Revenue Act 1889. The Queen's Bench Division (Grantham and Channell JJ.) made an order and declaration accordingly in those terms, and this decision was affirmed by the Court of Appeal (A. L. Smith, Rigby and Vaughan Williams L.JJ.) (1) The appellant did not dispute that estate duty was payable upon the mansion-house, its effects and appurtenances.

Feb. 13, 15. *Haldane Q.C.* and *Bremner* for the appellant. The Court of Appeal held that the case fell within the Finance Act 1894 s. 2 sub-s. 1 (*c*) and s. 38 of the Customs and Inland Revenue Act 1881 as amended by s. 11 of the Customs and Inland Revenue Act 1889 as property taken under any gift of which property bonâ fide possession and enjoyment was not assumed by the appellant immediately upon the gift and thenceforward retained to the entire exclusion of the late Earl "or of any benefit to him by contract or otherwise." But this is an erroneous way of looking at the rent-charge and the covenants by the appellant. In the present case the "gift" was a gift only of the balance after deducting the 4000*l.* and other deductions. Of that gift the appellant did take possession immediately and retained it to the entire exclusion of the late

(1) [1898] 2 Q. B. 534.

H. L. (E.) 1900 GREY (EARL) v. ATTORNEY-GENERAL.

Earl or of any benefit to him. The appellant had the entire control and could if he pleased have sold absolutely to a purchaser with a good title at any time before revocation, under the clause specially providing for that. The rent-charge was outside the gift and formed no part of it. The rent-charge might have been taxable under s. 2 sub-s. 1 (*b*) of the Finance Act 1894 but for the deed of release which also released the power of revocation. It is not any benefit that will bring the case within the Act: it must be a benefit with relation to the death which is not the case here.

Sir R. E. Webster A.-G., Sir R. Finlay S.-G. and *Vaughan Hawkins* for the respondent were not heard.

EARL OF HALSBURY L.C. My Lords, there are some cases so extremely plain that it is difficult to give any better exposition of the question than that which the statute itself provides. In the present case I did not at first quite understand the argument presented to your Lordships, and I am not absolutely certain that I have got much further now; but at all events, forming my own judgment upon the statute, nothing appears to me much more plain than this, that what the Act of Parliament intended to prevent was that what has been described as a gift inter vivos should nevertheless reserve to the settlor some benefit, or some part of that which purported to be given inter vivos. In this case can anybody doubt that something has been reserved to the settlor? The settlement itself has reserved 4000*l.* a year, and has reserved a right also on the part of the settlor that all his debts up to the period of his death should be paid, and the payment secured by the estate. It seems to me that it is burning daylight to say that is not within the express language of the statute, and I am really wholly unable to understand why these words are not as plain in the statute itself as any explanatory exposition could make them. That, my Lords, is really all I have to say upon the subject. It seems to me it is a particularly plain case, and I move your Lordships that this appeal be dismissed with costs.

LORDS MACNAGHTEN and MORRIS concurred.

H. L. (E.) 1900 GREY (EARL) v. ATTORNEY-GENERAL.

LORD SHAND. My Lords, I also am of the same opinion. I think the learned judges who have dealt with this case in the Court below have expressed very fully and carefully the reasons upon which their judgment is founded.

LORDS JAMES OF HEREFORD and BRAMPTON concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, February 15, 1900.

Solicitors for appellant: *Flux & Leadbitter.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (I.) 1900 *Feb.* 16.

CRUMPE . . . . . APPELLANT;

AND

CRUMPE AND OTHERS . . . . . RESPONDENTS.

Will — Construction — Intention — Revocation — Estate Tail — Wills Act (1 Vict. c. 26) s. 28.

A testator by his will devised his fee simple estates to trustees to give the rents to S. M.; but in case S. M. encumbered the lands or rents at any time the testator revoked the gifts of the rents "from S. M. and from his heirs male," or should S. M. not forfeit the same and should "die without male issue him surviving," he bequeathed the rents and estates to R. M. and his issue male in tail male:—

Held, that upon the true construction of the whole will the testator's intention was clear that S. M. should take an estate tail.

The decision of the Irish Court of Appeal, [1899] 1 I. R. 359, affirmed.

THE will dated June 1, 1874, of Francis Crumpe who died in 1877 contained the following devise:—

"After the gifts and annuities are provided from my personal property and the investments effected for my nieces and the church and poor from rents of lands and dividends of investments combined, I then devise my lands, fee simple estates (by

H. L. (I.) 1900 CRUMPE v. CRUMPE.

whatever name or tenure I hold the same) in trust to the executors and trustees of my will, to allow and give the rents (received by an agent) of my lands, to be half-yearly paid to and received by my nephew, Silverius Moriarty, barrister-at-law, now in Tasmania, provided he in one year after he begins to receive those rents assumes by Royal licence, and adopts the name and arms of Crumpe, the surname of Crumpe, no other surname following or preceding the name of Crumpe, such name to be adopted by him and his heirs. And I further declare no taker shall possess the rents of my estate who does not conform to and comply with this mandate and desire; and I further declare the said Silverius shall receive said rents conditionally, that he the said Silverius shall have no power of encumbering these lands or rents by anticipation or by debts, mortgages, mortgage bonds, bonds, promissory notes, bills of exchange, rent charges or any other legal security or device, and if the said Silverius does so at any time, although obeying the injunction given as to change of name, I then revoke the gift of the rents of these my fee simple estates from the said Silverius my nephew, and from his heirs male; or should the said Silverius not forfeit the same and die without male issue him surviving, I then will and bequeath these rents and estates but conditionally to his brother Commander Moriarty, R.N., and his issue male in tail male his first and every other son lawfully begotten and the conditions and restrictions under which he is to enjoy the same, he must relinquish all claim to the dividends of my investments in banks, railway companies or any securities and that he the said Commander William Moriarty, R.N., and his heirs male shall in six months after he began to receive these rents assume bear and take by Royal licence the surname and arms of Crumpe, no other surname preceding or following the name of Crumpe, and that the said Commander William Moriarty, R.N., shall have no power of incumbering these lands or rents by anticipation, or by bonds, mortgages or any other legal security, and if he does so at any time I then revoke the gift of those rents and lands from him and his heirs male, or should he die without heirs male arriving to age or marriage, I under any of the above circumstances

occurring will and desire my executors and trustees to sell out each separate estate in the Landed Estates Court, Dublin, and the produce thereof to divide into equal shares or portions."

A previous clause in the will, after making a bequest of dividends on investments, ran as follows: "When the above investments are effected I then will and devise and bequeath the dividends from my investments first subject to annuities or to all calls demands or debts made on me and due and gifts and annuities or interest. Money (which may possibly be due on a mortgage of my land at Cahareen near Castle Island) to be half-yearly received by and made payable to my nephew Commander Moriarty, R.N., during his life, giving him only a life interest in said dividends or until he may happen to come into and enjoy my estates by decease of his brother Silverius or by his brother Silverius forfeiting enjoyment of said rents of said lands or by his brother not forfeiting the same but dying without issue male lawfully begotten him surviving, whichever event shall first occur."

Silverius Moriarty took the name and arms of Crumpe and died without issue. The appellant having brought an action to establish his title to the lands as heir in tail of William Moriarty, the question in this appeal was whether Silverius Moriarty took an estate in fee simple subject to an executory devise over (as the appellant contended), or an estate tail, as the Vice-Chancellor and the Court of Appeal in Ireland held, dismissing the action. (1) The respondents claimed under a disentailing deed executed by Silverius Crumpe and his will.

Neville Q.C. and *D. G. Chaytor* (Irish Bar) for the appellant. The devise to Silverius Moriarty being a devise of real estate without any words of limitation must by the Wills Act 1837 c. 26 s. 28, "be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will, unless a contrary intention shall appear by the will." Therefore the devise was of an estate in fee simple subject to an executory devise over. No words of limitation are introduced into the gift, and no limitation can be implied by the

(1) [1899] 1 I. R. 359.

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revocation or defeasance clause: that clause is only an inaccurate description of the gift, and cannot cut down the gift. The testator's intention appears from the gift itself and also from the previous clause relating to the gift of the dividends on his investments.

Rowden Q.C. and *J. G. Wood* for the respondents were not heard.

EARL OF HALSBURY L.C. My Lords, I agree with all the judicial persons before whom this case has come, that though ingenious difficulties may be suggested, still upon the ordinary principles of construction there can be practically no doubt as to what is the true construction of this will. When I speak of the true construction of the will I am speaking of what is, to my mind, to be attributed to this testator as his intention, indicated by the language he has used. It is true that in early times before the Wills Act certain principles of construction of wills had been established. I myself have never been quite satisfied whether or not it is wise to attempt to crystallize in a particular form the construction which is to be placed upon a written instrument without knowing what the whole of the written instrument is. The Wills Act in terms says that a devise of real estate shall be construed in a certain way unless the contrary intention appears. That, of course, must be a question of what is the intention as exhibited by the written words, looking at the whole instrument together, which is a principle which I take it is not confined in that respect to wills, but applies to any other instrument whatever whereby people signify their intentions.

Now it appears to me fallacious to put together two principles, as I think was ingeniously attempted to be done in the course of this argument. There is no doubt that under the operation of the Wills Act the words which are an introduction shewing what the testator is about to do would confer an estate in fee; but it is a mistake, as it appears to me, to assume that that was in the mind of the testator. If there is anything else in the will that qualifies and cuts down the meaning that the statute gives to such words you must take the whole instru-

ment together on the ordinary principles of construction of any document whatever.

It cannot be denied that there is no gift here which absolutely, in the ordinary use of language, confers an estate in fee. The words which follow are just as much part of that which the testator is dealing with as the words themselves, and it can hardly be denied—and in fact it has not been denied—that if the words that follow in more than one part of the will had been the words originally used, there could be no doubt in the world that it was an estate tail that was intended to be given. That being so, it is not denied that these words in the first instance are not words that exhibit any intention in the sense that I have pointed out, or indicate what was in the mind of the testator. We must find out from the rest of the will what was in his mind, and in my view it is very clear that what was in his mind was to create an estate tail which he thought was incapable of being alienated. Of course he was mistaken in that idea, but that was his notion, and that was what he intended to do.

If one looks at the words upon which so much reliance has been placed in the earlier part of the gift, one sees, as one of your Lordships (Lord Macnaghten) pointed out, that he was merely providing as if it was applicable only to the devisee's life. Of course it would not be the effect of it under the Wills Act, but that was what he was thinking of, that the devisee was to be paid half-yearly, and the money was to be handed over to him personally by the executors or the trustees. Then one has to look and see in the latter part of it what estate he had intended to create. For my own part I confess I have come very firmly to the conclusion that what he intended to do was to create an estate tail—what he thought was an estate tail—with the consequences which he erroneously imagined would follow upon the creation of an estate tail.

I do not know that I am quite able to agree with what some of the learned judges have said with regard to the gift over. I think one does get some light from that. It looks to me very much as if the consequences of that gift over were exactly what he had intended in the first instance—that is to say, that an estate tail should be created.

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Under these circumstances I move your Lordships that this appeal be dismissed with costs.

LORD ASHBOURNE. My Lords, I entirely agree with what has fallen from my noble and learned friend on the Woolsack.

The contention of the appellant's counsel here is, that the particular words relied upon must be construed to give a fee simple rather than an estate tail, and the whole argument addressed to your Lordships has been this, that attention is to be concentrated on the first four or five lines of a long continuing disposition, and that from them is to be deduced an intention on the part of the testator to create a fee simple. That intention is worked out, not from his own words, but from the construction which is to be imputed to them from the Wills Act. But, my Lords, it is absolutely impossible to concentrate attention solely upon those first four or five lines. You have to take the whole clause and to find out what is the continuous wish—the complete disposition of the testator in this case; and when you do that you find that the testator links every part of the disposition together, first with a proviso, then with a declaration, then with a condition, all leading up to the revocation clause; and that revocation clause is clear and distinct. The words he uses are his own words. They are not words borrowed from any statute or to be gathered from any implication; and if those words had been used in the first instance the case would not have been arguable, for it would have been manifest that it was not a fee simple but an estate tail that was given. But taking them as they are in the revocation clause, I take them as I think it is natural they should be used, as an explanation of the intention of the testator all through, which was to give an estate tail and not a fee simple. For these reasons I am clearly of opinion that the appeal should be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am entirely of the same opinion. The whole instrument must of course be read together, and reading the whole instrument together I find, to my mind, a sufficiently clear exposition of the gift. In

his will a testator may explain what he is doing, or what he means to do, by any form of words he pleases, provided he makes his meaning clear. Here, I think, the testator has made his intention clear. I find an indication of his intention in the first place in the revocation clause, but all the other circumstances point to the same conclusion. It is not a gift by implication, but it is an explanation of what he had done before.

H. L. (I.)
1900
CRUMPE v. CRUMPE.
Lord Macnaghten.

LORDS MORRIS, SHAND, JAMES OF HEREFORD, and BRAMPTON concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, February 16, 1900.

Solicitors for appellant: *Neish, Howell & Macfarlane, for Sutton & Son, Dublin.*

Solicitors for respondents: *A. F. & R. W. Tweedie.*

[HOUSE OF LORDS.]

FIELDEN . . . . . APPELLANT;

AND

MAYOR &c. OF MORLEY . . . . . RESPONDENTS.

H. L. (E.)
1900
Feb. 19.

Practice—Judgment for Defendants—Action for Acts done in Execution of Statute—Public Authorities Protection Act 1893 *c.* 61 *s.* 1.

By the Public Authorities Protection Act 1893 s. 1 judgment for the defendant in an action brought in respect of acts or alleged defaults in execution of an Act of Parliament, or of any public duty or authority, carries costs as between solicitor and client. This provision does not apply to appeals.

The decision of the Court of Appeal, reported as *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1, affirmed.

THE appellant having brought an action for an injunction to restrain the respondents from making or maintaining certain works and doing acts which they contended they were

H. L. (E.) 1900 FIELDEN v. MORLEY CORPORATION.

authorized by their special Act to make, maintain and do, they making good any damage done to the appellant's property, Byrne J. dismissed the action with costs to be taxed as between solicitor and client. This decision was affirmed by the Court of Appeal (Lindley M.R., Chitty and Collins L.JJ.) (1)

The present appeal having been heard and dismissed on the merits which turned on the construction of the special Act,

Cripps Q.C. (*Moulton Q.C.* and *Leigh Clare* with him) for the appellant mentioned the point about costs and observed that the Public Authorities Protection Act 1893 was a hard one, there being no corresponding provision in favour of a successful plaintiff.

Eve Q.C. and *R. J. Parker* for the respondents were not heard.

No formal judgment was given by the House (Earl of Halsbury L.C. and Lords Macnaghten, Morris, Shand, James of Hereford, and Brampton), the Lord Chancellor saying that the Act might be a hard one, but was plain as to the costs of the action: it did not apply to appeals.

Orders appealed from affirmed and appeal dismissed with costs.

Lords' Journals, February 19, 1900.

Solicitors for appellant: *Firth & Co. for J. E. Craven, Todmorden.*

Solicitors for respondents: *Sharpe, Parker & Co. for R. B. Hopkins, Morley.*

(1) [1899] 1 Ch. 1.

[HOUSE OF LORDS.]

SEATON . . . . . APPELLANT;

AND

BURNAND . . . . . RESPONDENT.

H. L. (E.) 1900 Feb. 27.

BY ORIGINAL APPEAL.

BURNAND . . . . . APPELLANT;

AND

SEATON . . . . . RESPONDENT.

BY CROSS APPEAL.

Insurance—Guarantee—Concealment of Material Facts—Uberrima Fides.

On the application of the appellant the respondent, an underwriter at Lloyd's, underwrote an instrument in the form of a policy whereby he guaranteed the solvency of a person who was surety for the repayment by the borrower of money lent by the appellant. The respondent made no inquiry as to the rate of interest payable by the borrower or as to the circumstances of the loan, and no information was given to him on those points. In fact the interest was over 30 per cent. and the borrower was unable to repay the loan. In an action on the policy the jury found that the transaction was not one of exceptional risk :—

Held, that the non-disclosure of the rate of interest and the circumstances of the loan did not constitute a defence, there being no evidence that those facts were material to the only risk undertaken by the respondent, namely, the solvency of the surety.

The decision of the Court of Appeal, [1899] 1 Q. B. 782, granting a new trial, reversed.

AN action was brought by the appellant against the respondent on a policy which was dated Lloyd's, E.C., December 2, 1897, and ran as follows :—

"Whereas, Mrs. Louisa Christian Seaton has advanced to Major-General Barwell the sum of fifteen thousand pounds on his promissory note for 15,000*l.*, dated 3rd December, 1897, and due on the 3rd June, 1898, and whereas Sir Frederick Seager Hunt, Bart., has guaranteed to the said Mrs. Louisa Christian Seaton the due payment of the said bill for 15,000*l.* We, the undersigned underwriters, in consideration of a

H. L. (E.) 1900 SEATON v. BURNAND. BURNAND v. SEATON.

premium of fifty shillings per cent., which we hereby acknowledge to have received, each for himself and not one for another, hereby guarantee the solvency of the said Sir Frederick Seager Hunt, Bart., in respect of and to the extent of the said bill for 15,000*l.* No claim to attach to this policy until the said Sir Frederick Seager Hunt, Bart., shall have a receiving order in bankruptcy made against him, or shall call a meeting of his creditors or, in the event of the decease of the said Sir Frederick Seager Hunt, Bart., before payment of the said promissory note, his estate be insolvent."

The respondent defended the action on the ground of misrepresentation and concealment of material facts.

At the trial before Bigham J. and a special jury it appeared (omitting conflicting evidence) that the 15,000*l.* was made up of the amount of a former promissory note, unpaid, a present advance to General Barwell of over 8000*l.*, and interest at the rate of over 30 per cent. General Barwell also agreed to pay interest at the rate of 30 per cent. on the sum of 15,000*l.* if the promissory note was not paid at maturity. The appellant being desirous of insuring Sir F. S. Hunt's guarantee sent her agent, Mr. John Lion, to the respondent to arrange it, but did not tell Mr. Lion the rate of interest or the circumstances of the loan, and these were not disclosed to the respondent. Mr. Lion told the respondent that Sir F. S. Hunt was a very wealthy man: the respondent said he must make inquiries of Sir F. S. Hunt's banker, and went with Mr. Lion to the banker, who was also the respondent's banker. The banker told the respondent that there was a certain amount of Sir F. S. Hunt's paper about, but he believed he was good for 15,000*l.* The respondent underwrote the policy for 240*l.*, and others underwrote it for various amounts. In 1898 Sir F. S. Hunt called a meeting of his creditors, and the note was never paid. In answer to questions put by Bigham J. the jury found that the transaction was not one of exceptional risk, and that the respondent acted both upon the information he got from Mr. Lion and from that which he got from the banker. Both parties agreed that no other questions need be left to the jury, and Bigham J. entered judgment for the appellant for 240*l.* Upon a

motion to enter judgment for the respondent or for a new trial on the grounds that the verdict was against the weight of the evidence and for misdirection, the Court of Appeal (A. L. Smith, Collins and Romer L.JJ.) ordered a new trial upon the ground that this question (inter alia) should have been left to the jury: Whether taking into account the statement made to the underwriters it was a concealment of a material fact not to disclose to them the circumstances under which the loan to General Barwell had been made and the rate of interest demanded and obtained. (1) Against that decision the appellant brought this appeal, and the respondent brought a cross-appeal asking for judgment.

Feb. 26, 27. *Sir E. Clarke Q.C.* and *Joseph Walton Q.C.* (*Scrutton* with them) for the appellant. Accepting the law as laid down by the Court of Appeal that such a contract as this is one to which the doctrine of uberrima fides applies, it is enough to point out that the matter was left fully and fairly to the jury, and that none of the facts upon which the respondent insisted were material to the risk undertaken by the respondent, namely, the solvency of General Barwell.

Sir R. T. Reid Q.C. and *Lawson Walton Q.C.* (*Carson Q.C.*, *Willes Chitty* and *F. Newbolt* with them) for the respondent. This was not an ordinary transaction: it was a money-lending transaction of exceptional risk. The loan was at nearly 40 per cent., and there was evidence that the appellant not only insisted upon that rate of interest, but refused to lend the money unless she could obtain a Lloyd's policy at a low premium insuring the guarantee. The policy is dated the day before the date of the promissory note. The appellant sends an agent ignorant of the facts and takes care that the underwriters shall not know either the rate of interest or the fact that she would not lend without the security of a policy. These facts were material to the nature of the risk, and ought on the principle of uberrima fides to have been disclosed. No underwriter knowing those facts would have accepted such a risk at 5 per cent. Upon these facts judgment should have

(1) [1899] 1 Q. B. 782.

H. L. (E.) 1900 SEATON v. BURNAND. BURNAND v. SEATON.

been entered for the respondent: or if that be not clear the jury should have been asked whether there was anything in the transaction of such a character that it ought to have been disclosed. [They referred to the cases cited by them in the Court below, and also contended that the verdict was wrong.]

EARL OF HALSBURY L.C. My Lords, in my view of this case it might be very simply dealt with indeed, but out of respect to the learned judges who have taken a different view of it I will just say a word or two upon the grounds upon which it is to my mind exceedingly clear that this judgment of the Court of Appeal must be reversed.

My Lords, we have had a great many topics urged upon us which seem to me very irrelevant to the real question which is here being determined. This was a transaction in which a person borrowing money, it is said, at a very high rate of interest—30 per cent.—was guaranteed by a gentleman at that time of very high commercial credit, and the person lending the money insisted upon the additional circumstance that there should be the guarantee of a policy at Lloyd's for the purpose, not of establishing a right to have the money paid, but to guarantee the solvency of the gentleman, as to whom I do not now know that there was the smallest reason to doubt that he was a perfectly solvent person at that time—and I do not know that there was any one who could, or did—certainly nobody did at the trial—suggest any circumstance known to the lender which would to any degree diminish by a feather's weight the solvency of Sir Frederick Seager Hunt. Under these circumstances underwriters at Lloyd's underwrite what I will call this policy for the guarantee of the solvency of Sir Frederick Seager Hunt. That was the contract upon which they entered and upon which they are now being sued.

My Lords, what is the case set up now? Except for a suggestion made by the learned counsel, for which there is not the faintest scrap of evidence, that there may have been something affecting the solvency of Sir Frederick Seager Hunt, the case set up now is, "We wanted what is compendiously called now the whole transaction explained to those who were going

to enter into this policy." My Lords, I entirely differ from the view that any such thing as the circumstances of the original loan could or ought to have affected the minds of those who were entering into this contract. I do not believe that any one of them would have thought any such thing. I will come in a moment to what it is suggested would have occurred to them as material, but I do not believe that any one would have thought that material, and the reason I say that is not that I rely upon my own judgment alone, but I look at what as a fact those business men did in reference to it. Did they inquire by a single question what were the circumstances of the original loan? Did they ask anything about the original loan, or how it came to be made? Not a word. What they did was what as business men and as sensible men would be the natural thing for them to do—they went and inquired at the bank and found out what the commercial reputation of Sir Frederick Seager Hunt was; they were satisfied with the result of their inquiries and they entered into this contract.

My Lords, it appears to me that there is the beginning and the ending of this case. There is no pretence for saying that the parties who obtained this contract with the underwriters knew and kept back anything which could have affected Sir Frederick Seager Hunt's credit, subject of course to what may be said afterwards about the nature of the loan itself, with which I will deal in a moment. To my mind that was the whole question, and on that point it appears to me to be absolutely out of the question that you can go back any further than that. It is very easy to use the phrase that they wanted "the whole transaction explained to them"; you must explain what you mean by "the transaction." If you mean the transaction of the policy, then, as to the only thing that was guaranteed by the policy, namely, the solvency of Sir Frederick Seager Hunt, they did know all that the persons obtaining the contract themselves knew, at least so far as the evidence went, and I am not going to speculate whether if some other witness had been called and something or other had been elicited from him which we do not even now know, a different state of things might have arisen. Of things that do not appear and

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things that do not exist the reckoning in a court of law is the same, and it is enough for me to say that there is not a fragment of evidence which can even be pointed to here which could have affected the question of the solvency of Sir Frederick Seager Hunt.

But, my Lords, it is said that this is not an ordinary business transaction. Those words, of course, themselves require exposition—I do not know what an ordinary business transaction means. Of course the transaction itself of guaranteeing the solvency of somebody who is to be a security for somebody else's debt is, I admit, a somewhat extraordinary transaction. But that upon the surface was known to these people who entered into this bargain themselves. It is the very nature of the transaction, and that indeed might have raised suspicion in some people's minds. To my mind it would have been a somewhat odd transaction, I admit. I was not aware, until this case, that such a transaction as this, any more than the determinations of judicial tribunals, is now made the subject of policies at Lloyd's—I was not aware of that, but certainly it would have struck my mind as an odd transaction if it had come before me previously.

But then it is said now, after the liability has arisen, for which as a matter of fact the underwriters received payment (because it was a matter of payment), when they are called upon to pay, it is said, "We ought to have known the circumstances of the original loan, and if those were special circumstances applicable to the original loan, we ought to have had our minds directed to them, and then we would not have accepted such a transaction." Of course, what people persuade themselves they would or would not have done when a liability has arisen, is a thing with which one is sufficiently familiar in courts of law. If goods which have been contracted for go up or down in the market, one has heard very strange evidence about what induced people not to take the goods; and in the same way, when it has turned out that this guarantee is to be sued upon, people convince themselves in a very odd way as to what would have affected their minds if they had known it at the time.

But, my Lords, let us look a little more closely at what the underwriters themselves say. Let us take the evidence of the gentleman who is relied upon to establish the proposition that they would not have taken this guarantee if they had known that a rate of interest of 30 per cent. was charged. My Lords, I interrupt myself for a moment to say that I decline to deal with the question whether or not the loan was actually made at the time. It appears to me that that question was never substantially raised at the trial: it is now put as a misrepresentation. I suppose if it had been alleged that the money was not actually paid and the loan not made, but that the whole thing was agreed and arranged for, nobody could have said that there was any difference between a loan having been actually made and a loan having been agreed to be made, but it is enough to my mind to say that the question was never raised at all. What was contended and what was put before the learned judge, who treated it much more favourably than I should have been disposed to do if I had presided at the trial, was that this rate of interest would have suggested that the transaction was so risky that they would not have entered into it. Now, obviously it is important to inquire, not what you say now, but what you said at the time. This is a question of this loan of 15,000*l.* 15,000*l.* was the gross sum to be paid, but it was not to be paid in the shape of so much principal and so much interest for that time, but it was a gross sum, and therefore business men would know that if it was a loan at interest that gross sum included the interest, and if they had thought it material they would have inquired how much was interest and how much was principal to be repaid. But did they ever think of any such thing? Let me take their own evidence. At page 76 this question is asked of Mr. Burnand: "You say you naturally assumed it was at interest, but you did not ask what the interest was? (*A.*) No, I did not. (*Q.*) Did not one of the persons to whom you took the slip ask what the interest was? (*A.*) Not a single one." Out of something like fifty persons engaged in the business and familiar with business not one of them asked this question, which is now regarded as all important, what the interest was; and in the face of that

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your Lordships are now asked to say that this was such an important circumstance that they would have taken a different view if they had only known that the interest was 30 per cent. Mr. Burnand was further asked: "Do you think it was material to know what the interest was? (*A.*) It was material to know if it was 30 per cent. (*Q.*) Was it material to know what the rate of interest was? (*A.*) No, because I understood from Mr. Lion that it was a friendly thing, and I presumed they paid about 8 or 9 per cent." I will not comment again upon the friendliness of taking 8 or 9 per cent., but it seems to me that the whole tone of the witness shews, perhaps unintentionally, how perfectly idle and beside the real point was any notion as to the original loan and the terms upon which it was made. Then he is asked again: "If it was material, can you explain how it was not one of the persons to whom that slip was taken asked the question? (*A.*) No; well, I suppose they believed the same as I did: it was a bonâ fide honest transaction, and, at whatever the ordinary rate is, friendly. (*Q.*) Do you mean to suggest that this is not a bonâ fide honest transaction? (*A.*) Well"—the witness evidently hesitated.

My Lords, once that admission was made, if this question could ever have been raised, which I doubt, as to the materiality of what took place at the original granting of the loan, it seems to me that is decisive of the whole question. Then, what is there left? It is suggested now, indeed, that the verdict is against the evidence. I think Mr. Lawson Walton went so far as to say that no reasonable jury could have found the verdict they did. I was sorry to hear him say so, because I should certainly have found the same verdict, and I am afraid the inference is unfavourable to me when I say that. I quite think that it was a reasonable verdict, and I am very much disposed to think that it is the only verdict that could have been found. I doubt whether, if the jury had found the other verdict, it would have been possible to sustain that verdict. What is put here is something that does such violence to one's common sense that if the verdict had been found the other way I doubt whether it could have been sustained.

My Lords, even the judgment of the Court of Appeal which

is relied upon really does not enter into the question which has been so strongly argued before your Lordships, because what the Court of Appeal say is that other questions ought to have been asked, and they formulate two questions which they say ought to have been asked. That is disposed of by the course which was taken at nisi prius. The learned judge with great care and deliberation formulated questions and submitted them to counsel, and gave counsel time and opportunity of considering whether any other questions ought to be asked; and, after taking time for consideration, the learned counsel for the defendant stated that there was no other question which they wished the jury to be asked, nor did they wish to vary the form of the questions that were proposed to be asked. Under such circumstances it would really be putting a premium upon the loosest possible mode of conducting business to suggest that questions could be again formulated by counsel and then submitted to another jury. Under these circumstances it appears to me that it is impossible to sustain the judgment of the Court of Appeal, and I move your Lordships that that judgment be reversed.

LORD MACNAGHTEN. My Lords, I agree.

LORD MORRIS. My Lords, I am of the same opinion. It appears to me that a good deal of the argument that has been addressed to us on the part of the defendant has arisen from the fact that, in my judgment, the learned judge who tried the case was entirely too favourable to him in his charge. The case appears to me to be somewhat confused as to what the risk and liability were that the defendant entered into. He did not enter into any insurance that the debt would be paid by General Barwell, the borrower. The only risk that the insurer, Mr. Burnand, entered into was on the matter of the solvency or insolvency of Sir Frederick Seager Hunt. His insolvency would of course lead to the result that the defendant and his co-underwriters would have to pay; but the real risk, and the only risk, that they were looking at was on what terms would they insure against the insolvency of Sir Frederick Seager Hunt. They insured against it, it is said, at a very moderate

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premium. And naturally, because it is the common case that he was looked upon at that time as a man of very great wealth. Therefore, the question as to whether the defendant, Mr. Burnand, should have been told any matter connected with the initiation of the transaction appears to me to be almost irrelevant, because it was not, as I have said, the risk which he really undertook or that as to which he inquired. He naturally went to his own bank—Parr's Bank, a well-known bank—and there he ascertained that Sir Frederick Seager Hunt was a man whose solvency was unimpeachable, although there was paper of his out. With regard to this it has been observed that he was the head of a great distillery, and under those circumstances I suppose there is always paper out of persons in affluence. At all events, he satisfied himself of Sir Frederick Seager Hunt's solvency.

My Lords, in my opinion the case should have ended there, because at the trial there was no direct evidence, although there has been some suggestion or insinuation by the learned counsel at the bar, that there was any representation made on the part of Mrs. Seaton or her agents affecting the solvency or insolvency of Sir Frederick Seager Hunt. And it goes beyond that—they also supposed that he was a wealthy man, and there was no suggestion that anything had been kept back. But the learned judge at the trial yielded, in my opinion, too much to the application of the defendant, and he formulated questions which he proposed to put to the jury—a practice which grew up when the old system of pleading was abolished by which technical pleaders reduced a thing to a point, which point had to be submitted to a jury. Now, in consequence of the change in the system of pleading, the duty and labour are thrown upon the judge of finding out what are the real questions that will decide the case between the parties; and, according to my experience, which is not an inconsiderable one (not on this side of the Channel, but on the other), a judge, in any case of importance where he thinks the case is deserving of it, submits the questions which he considers involve the real issue between the parties to counsel on either side; he hears them if they disagree, and he hears them to

suggest any new question which ought to be put; and, finally, he submits the questions to the jury.

In this case the learned counsel on both sides acquiesced in the questions as proposed by the learned judge; and now it is said that there are two other questions which ought to be put. My Lords, of course I do not say the rule is so extreme that if there were some extraordinary miscarriage of justice the persons concerned should be bound by it; but in an ordinary case, in my opinion, the parties must be bound by what is called the course of the trial—that is to say, the way in which the trial was carried on—and when the learned counsel on both sides agree upon what are to be the questions to be put to the jury, in my opinion it would be only in an exceptional case (so exceptional that at the moment I cannot anticipate what would be the circumstances that would, in my judgment, justify it) it could be held that any other questions should be submitted to the jury beyond those which the parties had agreed upon.

But then, my Lords, it is said that the judge did not dwell upon particular points. I never heard that by way of objection to a judge's charge you might enter upon a sort of literary criticism upon it, and say that he did not put this point or press the other; indeed, it is said that he should have reviewed the evidence, which I suppose in some cases would mean that he should have read it over for days, when an ordinary jury would get obfuscated instead of being assisted. If counsel thought that the learned judge had not called attention to any particular point, in my opinion it was their duty to call his attention to it at the time, and ask him to submit it to the jury. Are counsel to stand by and say, "You overlooked that point, and though I had already put it myself to the jury till they were quite tired of it, I think the judge ought also to have laboured it." That would, in my opinion, be throwing a duty upon the judge of a most extraordinary character.

My Lords, in my opinion there would be a great miscarriage in this case if there was to be any new trial under the circumstances, and I therefore cordially concur in the motion which has been proposed from the woolsack.

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LORD SHAND. My Lords, I only add a few words to what has been said so fully by your Lordships—in all of which I concur—because of the circumstance that this has been a unanimous judgment of the Court of Appeal giving a new trial in the case.

I concur entirely in the ground of the judgment which has been already stated, which I understand to be practically this: that the real question, and the only question, for the consideration of the underwriters was the question whether Sir Frederick Seager Hunt was a good security for the sum of money for which he granted his guarantee. It appears to me that the matters relevant to that point of Sir Frederick Seager Hunt's solvency were the only questions which required to be considered by the jury, and, as my noble and learned friend on the woolsack has said, every one who has been examined in the case has expressed the opinion quite decidedly that Sir Frederick Seager Hunt was perfectly solvent, and this was so according to the views of every one who could judge of the subject—the bankers, and all the persons connected with this business also.

That, my Lords, seems to me to be enough for the disposal of the case; but I cannot help adding that it humbly appears to me that the Court of Appeal have made a case for the respondent which I think he did not make for himself at the trial of the cause. The point disclosed on the pleadings, and on which the discussion here has mainly turned, has been that nearly 40 per cent. was demanded as the interest upon the loan which the lady required, even with the guarantee which she got, and it has been said that this was so remarkable a rate that it should have been disclosed. My Lords, Mr. Burnand himself, one of the underwriters involved, was examined as one of the witnesses. He was one, as I say, of the persons bound by the obligation, and, if it was material for him to know the circumstance that so large an amount of interest was demanded, I should have expected him to have said so, and to have said so very clearly. There were others of the underwriters who were in court who might, if they could fairly, have said the same thing; but no such evidence was offered. All I can say

with regard to that is that I think even the evidence of Mr. Burnand himself falls very far short of anything of the kind.

I must further add that I am of opinion, as Mr. Joseph Walton very forcibly put it, there was enough to put members of Lloyd's on inquiry. It was for them to inquire if they thought further information was required. The very circumstance that a guarantee of Sir Frederick Seager Hunt's obligation was asked for indicated that at all events security, which was ample and substantial, was required, and that circumstance was sufficient to put them upon inquiry—such inquiry as they made by going to the manager of the bank, from whom they ascertained what Sir Frederick Seager Hunt's circumstances were.

Taking the case, therefore, as one of uberrima fides, I am humbly of opinion that the jury were justified, on the evidence before them, in the answer they gave to the question whether this was an exceptional risk when they said "No," which included the evidence of one of the underwriters himself, who did not say it was—at least, so I read his evidence.

My Lords, I observe that in the Court of Appeal it has been stated that the learned judge did not explain fully what he meant by an "exceptional risk." On this point I differ also from their Lordships. The learned counsel on both sides had not only had questions adjusted by the learned judge, with which they were satisfied, but had addressed the jury on the question of exceptional risk, and had no doubt entered fully into the subject, and Bigham J. then dealt with it thus. I will not read again the passages which were dwelt upon particularly by Mr. Walton; I will only read the passage in which the learned judge said: "Mr. Burnand must have known that the money was lent at a high rate of interest, but was the risk of such an extraordinary character that he could not have foreseen or believed, or supposed that any such price as 30 per cent. was being paid? That is the first question I am going to ask you, and you will consider it, if you please, now, and give me your answer." That was, in my humble opinion, putting it in as favourable a light as the underwriters could have desired; and accordingly I am of opinion with your Lordships

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that Bigham J. did give a full explanation, and did not put the question in a bald way, as has been suggested, to the jury for their answer. In these circumstances I am of opinion, with your Lordships, that there should be no new trial in this case, but that the case was well and properly tried before Bigham J.

LORD DAVEY. My Lords, I agree.

LORD BRAMPTON. My Lords, I entirely concur with everything that has fallen from the noble and learned Lord on the woolsack in the judgment which he has delivered, and I have only one word to add. I conceive myself that it is a case in which the original consideration for the loan or for the contract between the borrower and lender had really nothing to do with the issue which had to be determined in this action. The issue to be determined in the action was Yes or No, the contract being established by the execution of the document by these various underwriters, was the guarantor Sir Frederick Seager Hunt solvent and able to fulfil his obligation upon his guarantee? No question arose with regard to the original consideration itself. There was no doubt at all that the borrower was liable to pay the amount of 15,000*l.* upon that promissory note; there was no question at all about Sir Seager Hunt's liability, and how the original loan could have affected the solvency of Sir Frederick Seager Hunt I confess I am at a loss to see. The sole question was, was the contract entered into without any fraud and without concealment? I see no fraud and I see no concealment; and the only issue was, were the underwriters responsible upon that document which they signed, and which they have failed altogether to shew was obtained from them by any fraud or concealment whatever? I think the verdict was right, and that the judgment of Bigham J. was right.

LORD ROBERTSON. My Lords, in the Court of Appeal the question is much discussed whether the liability undertaken by the respondent was that of an insurer, or whether the transaction was not truly one of guarantee. That question has been entirely superseded by the footing on which the case has been placed by the learned counsel for the appellant; indeed,

Mr. Joseph Walton formulated his case thus: he said, "Without pronouncing upon that question, I shall assume for the purposes of argument that the duty of disclosure was as much incumbent in this case as it would be in a case of insurance."

Now, my Lords, in the Court of Appeal it has been said, and I suppose rightly, that upon that footing the duty of disclosure was a duty to disclose all facts material to forming a judgment of the risk, everything relevant and material to that question and no more, must needs be disclosed, and the question whether anything is material is, according to A. L. Smith L.J., a jury question. My concurrence in the motion which has been proposed by my noble and learned friend on the woolsack is rested, as I understand that of your Lordships to be, upon the ground that that question has been determined by the jury—that it was placed before them when the learned judge asked them whether the transaction was one of exceptional risk. Unless it was one of exceptional risk, there would be no materiality or relevancy in the circumstances which have been so much relied upon by the learned counsel for the respondent.

My Lords, criticisms have been made by the learned Lords Justices upon the adequacy of the formula adopted by the learned judge as exhausting the question for the jury. But, my Lords, that formula must be tested, not by its own terms, but by the explanations relative to the circumstances of the case which were given by Bigham J. He did discuss and he did point out precisely the questions which have been urged upon your Lordships' attention to-day, and with regard to those questions and matters the jury, as I think, cut at the root of the case when they answered that there was nothing exceptional in the risk. Upon that ground I think that this case has been well tried, and that the judgment of the Court of Appeal should be reversed.

Order of the Court of Appeal reversed; cross appeal dismissed; judgment of Bigham J. restored with costs here and below. (1)

Solicitors: *Thomas Cooper & Co.; Morten, Cutler & Co.*

(1) The order was not drawn up when this report went to press.

[HOUSE OF LORDS.]

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CARTWRIGHT . . . . . APPELLANT;

AND

THE GUARDIANS OF THE POOR OF THE SCULCOATES UNION IN KINGSTON-UPON-HULL . . . . RESPONDENTS.

Poor-rate—Rateable Value—Public-house—Evidence of Trade and Profits—Parochial Assessment Act 1836 (*c.* 96) *s.* 1.

In assessing the value of a licensed public-house for the poor-rate the existence of the licence and the amount of the trade which can be and has actually been carried on there are elements to be considered in order to arrive at the rent at which the house may reasonably be expected to let. Evidence of these facts is always admissible, and may be necessary where the ordinary evidence of market value by comparison with other public-houses is not to be had. Evidence of profits made is also admissible, but an inquiry into profits should be avoided where possible, because it is regarded as inquisitorial and oppressive. These are not rules of law but matters of practice and common sense, and it is not expedient to lay down rules about them.

The decision of the Court of Appeal, [1899] 1 Q. B. 667, affirmed.

Dodds v. *South Shields Union*, [1895] 2 Q. B. 133, commented on.

THE appellant having been assessed at 850*l.* gross estimated rental and 680*l.* rateable value as the occupier of the Star and Garter public-house in Hull and having appealed to quarter sessions, by consent and under a judge's order the matter was referred to an arbitrator to state a special case setting forth the facts proved and any points of law raised by either party with his decision thereon.

The special case is fully set out in the report below (1): for the present purpose the following summary will suffice.

The public-house was fully licensed and was situated at the corner of two streets, in both of which a great deal of traffic passed to and fro. The public-house was tied, that is to say, the tenant was bound to purchase all liquors sold by him from the landlords or from their nominees. The appellant

(1) [1899] 1 Q. B. 667.

had occupied it for about nineteen years. The rent he paid was 250*l.* but the rent of a tied house is always less than the rent at which it might be expected to let if it were free. The arbitrator found as a fact that the premises occupied a very good position for the purpose of trade, and a better position than any other public-house in the neighbourhood; that nearly all the public-houses in Hull were tied houses; that those which were not tied were of so little value and so far from the appellant's premises that the rents furnished no accurate criterion of the rent which a tenant might reasonably be expected to pay for the appellant's premises, and that it was not possible to ascertain with any approximation to accuracy how much better the position of the appellant's premises was, and how much more rent a tenant might reasonably be expected to pay for them without ascertaining the trade actually done there. The respondents' witnesses estimated the trade actually done upon the appellant's premises, and then by means of several rules of thumb or otherwise estimated the rent which a tenant might reasonably be expected to pay for premises on which such a trade had actually been carried on. The respondents proposed to give evidence of the amount of the appellant's weekly takings by cross-examining him. The arbitrator rejected this on the authority of *Dodds* v. *South Shields Union* (1), and held that the house was not "an exceptional case" or "in exceptional circumstances" within the meaning of that case unless it was so by reason of the facts he found. He overruled the appellant's contentions, namely: (1.) That in valuing the public-house for the purpose of the poor-rate, the existence of the licence must be left out of consideration, on the ground that the licence was a personal privilege granted to the occupier, and did not increase the value of the hereditament itself. (2.) That if the foregoing contention were wrong, the public-house should be valued without reference to the goodwill and the trade already done there. He held that the goodwill—that is the probability that its customers would continue to resort there whether the appellant continued to occupy it or not—was of considerable value. He also held that the rent which a

(1) [1895] 2 Q. B. 133.

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tenant might reasonably be expected to pay for the appellant's premises, taking into account the trade already done there, was sufficient to support the assessment appealed against, and that in valuing for the purposes of the poor-rate it was right to take into account the existence of the trade, and he dismissed the appeal.

The appellant having appealed, the Queen's Bench Division (Grantham and Ridley JJ.) dismissed the appeal, and this decision was affirmed by the Court of Appeal (Earl of Halsbury L.C., A. L. Smith and Collins L.JJ.). (1)

Balfour Browne Q.C. and *H. S. Cautley* for the appellant. The award is inconsistent on the face of it. The arbitrator rejected evidence of the weekly takings, but he admitted evidence of the number of barrels that went in and the number of people that resorted there. A public-house must be rated according to the market value of the house, i.e. the rent that the public are willing to give for it, and not with regard to profits, weekly takings or the trade done there. The premises alone are the subject of assessment, not the business done there, or the goodwill. The amount of business done depends largely on the personal capacity and skill of the publican, and it is impossible to estimate how much is due to that. If the mode of assessment adopted by the arbitrator is right all shops ought to be assessed with regard to their business: and that is never done. The real test is by comparison with other houses, due allowance being made for differences of situation, convenience &c. If evidence of business is admitted it will compel the publican to go into the box and prove that his takings are not what they are alleged to be: an objectionable course never hitherto allowed. The principles laid down in *Dodds* v. *South Shields Union* (2) should be observed; and see *Reg.* v. *Aylesford Union.* (3)

Bray Q.C. (*R. Cunningham Glen* and *Grotrian* with him) contended that the decision of the Court of Appeal was right and for the reasons there given; and referred to the judg-

(1) [1899] 1 Q. B. 667. (2) [1895] 2 Q. B. 133.
(3) (1872) 26 L. T. (N.S.) 618.

ment delivered by Lord Denman in *Reg.* v. *Grand Junction Ry. Co.* (1)

Cautley in reply.

LORD MACNAGHTEN. My Lords, notwithstanding the able argument on the part of the appellants, I think this is a very simple case. To my mind it is a question of common sense, and not a question of law. It is a question of common sense in the application of the plain language of the Act of Parliament.

What your Lordships have to consider is whether the learned arbitrator proceeded on the lines on which the Act of Parliament indicates that he ought to proceed. Now what has the arbitrator done? He has found that in this particular case there does not exist the ordinary basis of computation. And he has excluded any inquiry into profits. In that I think he was perfectly right, not that the profits if they could be ascertained would not be an element in arriving at the rent which a tenant might reasonably be expected to pay, but that any inquiry into profits should be avoided if possible, because it would be oppressive. There is nothing that a tradesman so much dislikes as any inquiry into his profits. In some cases it cannot be avoided, and then according to the decided cases the inquiry may be made; but in this case there has been no inquiry into profits. What the learned arbitrator has done is to take into consideration the amount of business which this public-house was doing. Was he wrong in that? Surely the very first thing that a tenant who was going to offer for a house of this sort would do would be to consider (roughly if he could not do it accurately) what amount of business the house commanded. It appears to me that the volume of business done in a public-house, as apparent to the man in the street—if I may use such an expression—is the very first thing that a tenant proposing to make an offer for such a house would take into consideration. That really is all that the arbitrator has done. That is clearly one of the circumstances which would influence persons bargaining about the rent of such a house as this.

(1) (1844) 4 Q. B. 18.

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I think that the judgment of the Court of Appeal is perfectly right, and I do not think it is necessary to say anything more, because it is not expedient I think to multiply definitions, or to paraphrase the language of an Act of Parliament, or to lay down anything which in another case might be treated as a rule. All we have to consider is whether in the particular circumstances of this case the arbitrator is right or wrong. I think he is right. Therefore I move your Lordships that this appeal be dismissed with costs.

LORD MORRIS. My Lords, I concur, and I especially concur in the opinion that this is a very plain case.

The Act of Parliament states very concisely that the question to be solved is, what would it be reasonably expected that the premises would let for to a tenant? That has been paraphrased (and personally I do not object to it) into, what would a hypothetical tenant pay? Now there does not appear to me to be any law at all in that question. I am told that two great divisions have been made by those who have built a superstructure of law upon that rather simple line in the Act of Parliament—into what are called "exceptional cases" and "ordinary cases." I can find no such distinction in the Act of Parliament. The Act of Parliament leaves it general. The tribunal that has to assess is to decide what the premises would be reasonably expected to be let for. That may in certain cases like railways, gas companies, docks, &c., be most difficult to ascertain, because there is no probability—I might almost say no possibility—of considering that there a tenant would ever arise to take it. Therefore, in that case the tribunal is obliged to resort to a discussion as to the amount of the profits that have been made, and to deduce some sort of estimate in a rough way from that to solve the problem of what the hypothetical tenant would pay.

The present case relates to a public-house, which is at a corner—they generally are so as to capture two streets—and it is said that it was not competent for the arbitrator, as a matter of law, to take into consideration the amount of profits or to weigh that in his mind largely or lightly—I am sure I do not know which, because this case has been rather dealt with

as if appeals could be made to the Court of Queen's Bench, the Appeal Court, and this House as to whether the arbitrator came to a right conclusion, not in point of law, but in point of fact. What error did he make in point of law? He asked himself almost the very first question that the hypothetical tenant would ask, namely, is this a house doing a good business or a bad business; is it a house with what is popularly called a roaring business, or is it a house that is going down for some reason or other, such as there being other houses in its neighbourhood? That is the very first question that a hypothetical tenant would put to himself: What have been the profits that have been made in it? Because that is the best proof as to whether it is doing a good business or not. True it is said A. B. might make good profits, but C. D. might lose. All that it is to be presumed the arbitrator would consider; he would not value it on the principle that it was always to have superlatively good occupiers, or the worst of occupiers. I suppose he would, as a sensible man, take a sort of average between them. The contention, as I understand it, is that the arbitrator in deciding that question as to what a hypothetical tenant would pay is to be precluded as a matter of law from entering upon the very question which, as I have said, in my opinion, is almost the first question that the hypothetical tenant would put. It is true that the best way of ascertaining what the trade was which was going on would be the production of the books of the then tenant; but that was objected to. It is suggested that the case of *Dodds* v. *South Shields Union* (1) decided that that is improper evidence. If it so decided, I can only say that I entirely disagree with it, and not being bound by it here, as the Lord Chancellor was when sitting in the Court of Appeal—if it goes that length I am entirely of an opposite opinion.

It is said that this would be an inquisitorial inquiry, a mischievous one, and several other adjectives are applied to it. I do not see how it is inquisitorial if the parties themselves are ready to bring the evidence forward. There is no force put on a publican to produce his books; he is not in this inquisition

(1) [1895] 2 Q. B. 133.

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threatened with the screw, and if he chooses not to bring forward his books he need not do so, and the arbitrator is then obliged to forage about for the purpose of ascertaining in the best way he can under those circumstances what the profits would be. As I have said, that question, in my opinion, is one of the most important factors in arriving at a conclusion as to what a sensible man would pay as rent for the premises.

My Lords, on these grounds, I am clearly of opinion that the decision of the Court of Appeal should be affirmed.

LORD SHAND. My Lords, I am of the same opinion.

The simple question which had to be answered by the arbitrator, and which this House has now to consider in dealing with his award, is: At what rent would the premises be reasonably expected to let from year to year? I am of opinion with your Lordships that the arbitrator has taken the proper elements into view in deciding that question.

It may be that in a case of this class it is not competent to prove, as the Courts have held in the case of Dodds, the amount of the actual detailed profits made by the tenant in the particular house in bygone years. The true ground for so holding is, I think, that such proof is or might be of an inquisitorial character. I can very well understand that on the part of the tenants it may be a very reasonable objection for them to make to evidence of that kind, that it would rip up affairs which they are not bound to disclose to the public in questions of this kind. If it were not so, it seems to me that such evidence would be admitted as an important element in ascertaining what trade has been done in the house; for really it appears to me that this would be the element of all others which a tenant might be expected to take into view in fixing the rent he ought to give for the premises. In this case the arbitrator made the trade actually done the main element in ascertaining the trade which might be expected to be done, and in reaching the rent which might reasonably be expected. In doing this I am of opinion that he was right, and I therefore concur with your Lordships that the appeal ought to be dismissed.

LORD DAVEY. My Lords, I am of the same opinion, and I am so entirely satisfied with the judgments which were delivered in the Court of Appeal that I should not trouble your Lordships with any observations were it not for the use which has been made in the argument addressed to your Lordships of *Dodds* v. *South Shields Union*. (1) My Lords, that case has been presented to us by Mr. Balfour Browne and his learned junior as if it laid down some great principles of law. They elevated the distinction which is drawn in the judgments in that case, between what they call exceptional cases and cases which are not exceptional, into a legal principle, and they have gravely argued before your Lordships that evidence which is admissible in the one case is not admissible in the other case. Now, my Lords, I say at once that I do not understand *Dodds' Case* (1) to have laid down any rule of the law of evidence. In my opinion the learned judges merely intended to sanction the practice which had obtained in dealing with these cases of rating, and if I thought that they had intended to lay it down that evidence which would be admissible in what are called exceptional cases would not be admissible in point of law in another case, all I can say is, I should hesitate very long before I accepted *Dodds' Case* (1) as correctly laying down the law.

My Lords, the question whether evidence of a particular class is or is not admissible in prosecuting the inquiry which the statute prescribes to us, namely, what rent a tenant from year to year might reasonably be expected to give for the premises, must be the same question whatever the form of the inquiry be—whether the inquiry be of an easy character or whether it be of a complex character—whether it be in a case which occurs frequently in ordinary life or whether it be one that only occurs occasionally. It appears to me that all that *Dodds' Case* (1) purported to do was to lay down a very convenient rule of practice. It may be shortly stated, paraphrasing the language—for I am not intending to use the language that was used by the learned judges, but giving my own interpretation of it—that where the premises in question are premises of

(1) [1895] 2 Q. B. 133.

H. L. (E.) 1900 CARTWRIGHT v. SCULCOATES UNION. Lord Davey.

a character which have what may be described as a market price, where a valuer acquainted with that class of property can come and say, "Property of the class to which these premises belong lets for so much a year; I can readily procure a tenant for the premises for so much, and I cannot procure a tenant for more"—then you do not want to go into the trade done on the premises. You have there what the statute prescribes to you; and if you have evidence of that kind, if you have the market price and what Blackburn J., using, I take the liberty to say, not his own language, but the language of Adam Smith, calls the result of "the higgling of the market," you do not want to go into evidence of the particular character of the trade done on the premises, and in that case it is an exceedingly convenient rule of practice that you should not allow questions of an inquisitorial character to be addressed to the occupier of the premises unnecessarily.

Now, my Lords, what is the true principle upon which this inquiry is to be conducted? My Lords, I conceive it is that which is stated by Lord Blackburn in *Mersey Docks* v. *Liverpool*. (2) The passage is quoted in the judgment of Collins L.J., but I will take the liberty of beginning to read a little earlier: "If the hereditaments," he says, "are such as to afford peculiar facilities for carrying on any kind of business, that facility does, beyond all question, enhance the value of the occupation; but though the profits which may be reasonably expected to arise from such a business no doubt form an element in estimating the enhanced value of the occupation of the premises, the actual profits made do not form any element, except in so far as they afford evidence of what might be reasonably expected to be made from the occupation of premises affording facility for carrying on such a business." I say, my Lords, in answer to a suggestion that was made from the bar, that in my opinion Lord Blackburn there was laying down a general principle applicable to all such cases, and not merely one that applied only to exceptional cases, where there is no market value or price or letting rent to which you can refer. And, my Lords, I venture to think that that is founded upon

(1) (1873) L. R. 9 Q. B. at p. 97.

common sense. I repudiate this distinction which has been made so much of between exceptional and ordinary cases. You have in each case to find out in the best way you can what is the rent which a tenant may reasonably be expected to give, and if the best way under the particular circumstances is to ascertain the use which a tenant might expect to be able to make of the premises, the facility afforded by the premises for the carrying on of a trade appears to me to be a primary and elementary consideration in the case. If you are to take into account the fact that the premises command a trade, you must surely ask what trade. Is it a large trade, or is it a small trade? And I do not know myself any better test of what trade they may be expected to command than the trade which they actually do command. It is not that you rate the profits, it is not that you rate the man's skill and judgment or discretion in the mode of carrying on the business, but you have to ascertain what sort of a trade the hypothetical tenant, as he is called, may reasonably expect to be able to carry on on those premises as an element in determining the rent he would be willing to offer.

My Lords, I entirely agree in a passage in the Lord Chancellor's judgment, which I will take the liberty of quoting and adopting as the expression of my own mind. His Lordship says: "It would be to my mind one of the most extraordinary things in the world if you could give expert evidence that such and such a house would be likely to command such and such a business, and yet not be able to verify that a priori opinion by proof of the fact that it did command such a business." A. L. Smith L.J. says: You may call it goodwill or you may call it anything else you like, but it is legitimate evidence to shew that it is a house capable of carrying on a good trade according to the matters which have to be taken into consideration by the hypothetical tenant; and he fortifies that evidence by saying it is carrying on a good trade because I see such and such things going on every day to my own knowledge.

My Lords, that appears to me to sum up the whole of this case.

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LORD BRAMPTON. My Lords, I am of the same opinion. It appears to me that, according to the dictates of good sense, the arbitrator has taken a very proper and correct view of this matter. The purport of the inquiry was, What would a tenant, who desired to carry on the business for which the house is adapted, in that house, give as the rent to a landlord who was willing to let the premises to him? It is said you must look at the value of the surrounding property, or, at all events, you are not to take into consideration the actual amount of the profit that was capable of being made in that house which is the subject of the inquiry.

In the first place, the proposition which is put forward by the arbitrator in the award which I have before me is this. He says: "I find as a fact that any person desiring to become a tenant of the appellant's premises in order to occupy them as a public-house would endeavour to ascertain the trade actually done thereon, by reference to the weekly or yearly takings or otherwise, before deciding what rent he would pay." Undoubtedly it is obvious that is the course that any prudent intending tenant would take, and the question is how he is to be satisfied with regard to what profits he could make if he did become a tenant and carried on the business in the house for which it was adapted. The house itself stands at the corner of the street—a very eligible position for a public-house to stand in. It is admirably adapted for the purpose of doing a large business and it has a licence. The business that was carried on therein undoubtedly has yielded, as is admitted on all hands, a very considerable profit, and that profit in that position in that part of the town can only be made while the house stands there unapproached by any other of the same character. It can only be made by using that house, which has a licence already attached to it, in the way in which it has been used by the tenant for the last nineteen years. There is every reason to suppose that the customers who have been going there, spending their money and consuming liquor there, will continue to do in the future just as they have done in the past.

Now, it is said that the trade is not to be taken into con-

sideration. How would the landlord himself look at the matter, apart from the tenant altogether? He would say, "I have a house; it is a house capable of enabling a man to earn by diligence and the application of his own personal abilities 1000*l.* a year in that house; he wants to hire it from me. I am not going to let it to him for a mere percentage representing the interest upon what I have laid out in bricks and mortar upon the house; that would not represent what I think the value of the house is; it is upon a spot where custom is attracted to it; if he can make 1000*l.* a year, as I think he can, I must have a suitable proportion—at all events, a bigger rent than I should have if the house were only capable of yielding him a profit of 100*l.*" My Lords, I will put the case in this way: Supposing in a street which runs at right angles to another street, so as to form in point of fact two streets, two ordinary houses are built, both alike in all their materials and in the accommodation which is provided—they are each licensed: the one house is let at 200*l.* a year, but in that house there is very little custom done, but yet there is enough custom there to support a man who pays his 200*l.* a year rent, and he is quite satisfied to pay that in that house. The house on the opposite side at the opposite corner of the street is capable of enabling a man to earn 1000*l.* a year. Is it right or reasonable, or good sense, to suppose that the landlord would let the one house for 200*l.* a year to a man who could earn by diligence 1000*l.* a year in that house simply because the two houses were like each other? He must take into consideration the capability of the house, the position it is in, and the power it gives to a tenant who properly occupies it to make a very large sum of money for his own profit. It seems to me that common sense would dictate the course I have suggested to the landlord.

Now, my Lords, what has the arbitrator done according to the finding, for I rather prefer to take the language of the arbitrator himself? What has he found? He says, "I hold that although the profits of trade (as such) cannot be rated" (nobody contends they can), "yet in estimating the rateable value of a public-house, if the ability to carry on a gainful

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trade therein adds to the value of such public-house, that value cannot be excluded merely because it is referable to the trade." I think he has very properly found that, although the profits in this house cannot themselves be assessed according to their value as profits, yet the power to earn them in that house increases the value of that house. I think that that is properly found by the arbitrator in the award he has made; and I therefore concur entirely in thinking that this appeal ought to be dismissed with costs.

LORD ROBERTSON. My Lords, I entirely concur, and I desire only to express my special agreement in the remarks made upon the previous cases by the Lord Chancellor, Collins L.J., and my noble and learned friend Lord Davey.

Order appealed from affirmed and appeal dismissed with costs.

Lords Journals, March 1, 1900.

Solicitors: *Rollit & Sons, for Rollit & Sons, Hull; J. W. Sykes, for Chatham & Sons, Hull.*

[PRIVY COUNCIL.]

WENTWORTH AND OTHERS . . . . APPELLANTS; J. C.* 1899 Dec. 6, 9.

AND

WENTWORTH AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Construction — Direction to Accumulate — Rents and Royalties from Mining Leases—Tenants for Life—Remaindermen.

A testator devised his residue upon trust to convert with power to postpone conversion for twenty-one years, and with a direction that the surplus income of the unconverted estate during the twenty-one years and all accumulations thereof should go in augmentation of capital. The residue was settled on trusts for tenants for life and remaindermen. The trustees under powers in the will granted a mining lease, and retained the leased property unconverted for more than twenty-one years :—

Held, that the rents and royalties received under the mining lease during the twenty-one years ought to be invested, and that the income therefrom ought to be invested and accumulated :—

Held also, that after the twenty-one years, the tenants for life of settled shares in the residue were entitled to receive out of the rents and royalties such an annual sum as in the opinion of the Court would under all the circumstances of the case be a fair equivalent for the annual income that would have resulted if the estate had been converted.

The rule laid down in *Meyer* v. *Simonsen*, (1852) 5 De G. & Sm. 723, and *Brown* v. *Gellatly*, (1867) L. R. 2 Ch. 751, approved.

APPEAL by some of the defendants from a decree of the Supreme Court (June 11, 1897) made in a suit brought to declare the rights of persons interested under the will of William Charles Wentworth.

Two questions were determined in the suit: (1.) Whether the rents and royalties received between the testator's death on March 20, 1872, and March 20, 1893 (a period of twenty-one years), under a certain mining lease granted by the trustees of his will under a power therein contained, were subject to a trust for accumulation; and (2.) Whether the rents and royalties

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD DAVEY, and LORD ROBERTSON.

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received under such lease after the expiration of the said period of twenty-one years were to be treated as capital or income, or how they ought to be dealt with. It was determined that the trustees were right in accumulating the first-mentioned rents and royalties, and also in reinvesting the interest thereon during the said twenty-one years, and that the whole of such accumulations were rightly regarded as capital; and that the secondly mentioned rents and royalties were to be treated as capital.

The material clauses of the will and the circumstances under which the above questions were raised are stated in the judgment of their Lordships.

The reasons given by the Court below, so far as are material, are as follows:—

"I think the tenants for life have failed to shew any intention on the part of the testator to displace the general rule of the English law that tenants for life are entitled to the rents and royalties of mines opened by the testator or contracted to be leased by the testator in his lifetime; but they are only entitled to the income arising from the investment of the rents and royalties of the mines opened or leased after the testator's death.

"It was further contended that the tenants for life were entitled to so much of the rent as is paid for the use of the surface of the soil—that is, rent in the ordinary use of the term and not purchase-money.

"If there were any means of adjusting the amount fairly, perhaps it might be so; but clearly the testator only authorizes the leasing of the surface as incidental to the winning of the coal: there is no provision for distinguishing between the two, and I think in this case the rent of the surface and royalties for the coal go together.

"I have already held that in deciding the respective rights of tenants for life and remaindermen the royalties payable under the mining leases granted by the trustees must be treated as capital. The question now is, must the Court hold those royalties to be moneys arising from the conversion of realty for all purposes of the will, in which case they would not be

'income of real estate remaining unsold or unconverted' within the meaning of the trust for accumulation? The conclusion I have come to is, that this question is not concluded by my previous decision, and for this reason: In deciding the relative rights of tenants for life and remaindermen to the royalties payable under a mining lease the Court starts with the presumption of law that those royalties must be treated as capital, and that presumption must prevail unless the Court, from a consideration of the whole will, finds an indication of the testator's intention sufficiently strong to displace that presumption: see Lord Blackburn's judgment in *Campbell* v. *Wardlaw*. (1) In this will I was of opinion that the testator's intention, so far as was indicated, was not opposed to that legal presumption; the power of leasing which was relied on as an indication to the contrary did not appear to me to be given to the trustees for the benefit of the tenants for life as against the remaindermen, but rather to enable the trustees to manage and develop the realty pending conversion to the best advantage for the benefit of all parties, tenants for life and remaindermen alike.

"But the matter I have now to decide is one of pure construction of the words of the testator unassisted and unimpeded by any legal presumption. The simple question is, what did the testator mean by the words 'income of unsold and unconverted real estate'? Did the testator in his will regard the granting of a mining lease as a sale or conversion of the land? I think the words of the trust empowering the trustees to lease make it clear that he did not. After having directed his trustees to convert his residuary realty with a power of postponement for twenty-one years, he says, 'notwithstanding any of the uses, trusts or purposes of this my will, I authorize my trustees to lease' for various purposes, including mining, the terms of the leases varying according to the several purposes, but extending to ninety-nine years for building leases. That appears to me to mean this: Although I have instructed my trustees to sell at the latest within twenty-one years, they may, if they like, not sell, but lease for ordinary purposes or for build-

(1) (1883) 8 App. Cas. 641, 645, 646.

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ing or for mining. In other words, if they take advantage of the power to lease, they will not, in the testator's eyes at any rate, have sold his estate. That this must be the testator's intention is further clear, to my mind, from the fact that the power to lease for mining purposes is in the same clause as the power to lease for ordinary purposes and for building purposes, shewing that in the testator's mind, at any rate, the three classes of leases stood in the same category.

"For these reasons, I think that in dealing with the trust for accumulation I must consider these royalties as income of unconverted realty within the meaning of the testator, and that the trustees were therefore right in accumulating them."

Warmington, Q.C., and *Theobald, Q.C.*, for the appellants, contended that the view of the Supreme Court was wrong. With regard to the accumulation during twenty-one years, the direction is limited on the true construction of the testator's will to the income of his unsold and unconverted real and personal estate. There is no further direction that the income arising from the investment of such income should also go in augmentation of capital. This last-mentioned income, being the result of invested income, is untouched by the trust for accumulation and belongs to the tenants for life of settled shares in the residue. As between them and the remaindermen, they were entitled to have it paid to them year by year as it arose. After the expiration of that period a different question arises. The power of the trustees to postpone conversion ceased. Therefore, whether or not conversion actually took place, the rights of the parties after the twenty-one years had expired must be determined as if it had done so. If the mineral property is retained unsold for the benefit of all parties interested in the estate, each tenant for life of a settled share in the residue ought to receive as much income as he would have received if the property had been sold. For that purpose a value ought to be put upon the mineral land at the expiration of the twenty-one years, and the tenants for life should be allowed 5 per cent. or some other percentage upon the estimated value. If the actual price eventually obtained for the land so

estimated should appreciably exceed or fall short of the estimated value on which the annual percentage had been calculated, the rights as between the tenants for life and the remaindermen could be readjusted, and the direction prayed could be made without prejudice thereto. Reference was made on this point to *Meyer* v. *Simonsen* (1) and *Brown* v. *Gellatly*. (2)

Swinfen Eady, Q.C., and *G. Serrell*, for the respondents other than the plaintiffs, contended, with regard to the accumulation during twenty-one years, that the income on the invested income should go in augmentation of capital. Land let on a mining lease is not sold or converted within the meaning of the testator. Accordingly, the rents and royalties received in respect of the mining lease, if regarded as income, arose from unsold and unconverted real estate, and, consequently, during the twenty-one years, were subject to the directions for accumulation. The same result followed according to the true construction of the will if the rents and royalties are regarded as the price or consideration, wholly or in part, for the gradual removal of the very substance of the estate. The primary intention of the testator was that conversion should take place, and that the proceeds should be invested for twenty-one years. At the expiration of that period the tenants for life were to have the income from such investments, but the remaindermen were to have the capital preserved intact. But the tenants for life were not entitled to receive the proceeds from mining leases as being income; unless such intention were clearly shewn in the will, which is not the case, such proceeds being either wholly or in part capital. The declaration in the will that rents, interest, and yearly produce of unsold real estate shall be deemed to be income for the purposes of the trusts is limited to that which is really annual produce. It cannot be extended to apply to that which, though received annually, is not produce but price. The leasing power given by the will was not intended to alter the rights of the parties, but to be used for the benefit of the estate generally. The trustees were no doubt bound to convert the estate as soon as practicable after the

(1) 5 De G. & Sm. 723. (2) L. R. 2 Ch. 751.

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twenty-one years had elapsed, but they were not bound to sell at a sacrifice. They were bound to exercise a reasonable discretion, and until they actually converted the estate and invested the proceeds the right of the tenants for life to the annual income did not arise, for no income accrued.

Leigh Clare, for the respondents.

Mander, for some respondents in the same interest as the appellants.

Elgood, for the respondent trustees who were plaintiffs.

1899 Dec. 9.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. William Charles Wentworth, of Vaucluse, near Sydney, in New South Wales, whose will has given rise to the questions which have been argued on this appeal, was a gentleman of considerable property. He died on March 20, 1872. His will was dated October 19, 1870. At the date of his will and at the time of his death his wife was alive and he had seven children living, two sons and five daughters. Three of his daughters were unmarried.

His will, stated shortly, was to this effect: After certain devises and bequests, he gave the residue of his property, real and personal, to trustees, of whom his wife and his eldest son Fitzwilliam Wentworth were two, upon trust for conversion. He empowered his trustees to postpone the conversion of any part of his real or personal estates for such period, not exceeding twenty-one years from his death, as to them should seem expedient, and he directed that until such conversion, and until the proceeds should be invested as therein directed, the income arising from his estate from time to time remaining unsold and unconverted should, during such period of twenty-one years, be applied in paying his debts and the rent-charges, yearly sums, and other payments thereinbefore directed to be paid out of his residuary estates, or out of the annual proceeds thereof, or so much thereof as the proceeds of any converted residuary estates or the income thereof should be insufficient to pay, and that subject thereto the surplus, if any, of the annual proceeds of his unsold and unconverted estates during the said period of twenty-one years, and all accumulations

thereof, should go in augmentation of the principal or capital of his residuary estates, and be applied and disposed of as part thereof. The will contained directions for raising three sums of 25,000*l.* each for the benefit of his three unmarried daughters. The ultimate residue of his estate was to be divided between such of his seven children as should be living at his death in equal shares. The shares of the daughters were settled upon trusts, which were in effect for the daughter for life, with remainder for her husband for life, with remainder for her children who, being males, should attain twenty-one, or being females should attain that age or marry. The share of the testator's second son, D'Arcy Bland Wentworth, was settled upon trusts, under which he is entitled to a protected life interest, with remainder over for the benefit of his children. There was an ultimate gift upon failure of the trusts of any of the settled shares for the testator's children living at the time of such failure, with a direction that any share accruing to D'Arcy Wentworth should belong to him absolutely, and any share accruing to a daughter should be held upon the same trusts as her original share. The testator declared that his trustees should have a discretionary power generally as to the sale, calling in, and conversion of any real and personal estate whatsoever forming part of his residuary estate, and the times and manner of selling and converting the same for the purposes of his will. Among the powers conferred upon the trustees was a power authorizing them to grant a lease or leases (with or without the surface) of the coals or other materials lying under any of his estates comprised in the residuary devise, with all proper and necessary powers, licences, way-leaves, easements, privileges, and authorities for getting and working the same for any term not exceeding sixty years.

The period of twenty-one years from the testator's death expired on March 20, 1893. The conversion of the testator's estate was not completed by that date.

Part of the testator's residuary real estate consisted of land in the county of Northumberland, New South Wales, which was known to contain valuable seams of coal, though the coal was not worked, or let, or agreed to be let, in the testator's lifetime. The trustees of the testator's will have retained this

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property unsold up to the present time. But in 1876 the then trustees granted a lease of the coal which they were authorized to let, or the greater part of it, with certain surface rights, for the term of forty years from January 1, 1876. Under this lease the coal has been extensively worked, and the trustees have received large sums in respect of rents and royalties. For some years past their receipts have exceeded 7000*l.* a year.

The present suit was instituted in November, 1895, by the respondent Fitzwilliam Wentworth, then the sole surviving trustee of the testator's will, mainly for the purpose of determining certain questions which had arisen as to the respective rights of the persons interested as tenants for life and remaindermen in the shares of the testator's residuary estate settled by his will. The present appeal has been brought by D'Arcy Bland Wentworth and his incumbrancers in the interest of the tenants for life. They challenge the judgment of the Chief Judge in Equity on two grounds. In the first place, they say that the Chief Judge was wrong in holding, as he did by his decree of June 11, 1897, that during the period of twenty-one years from the testator's death the trustees were bound to accumulate the income arising from the investment of the rents and royalties received under the mining lease of 1876. In the second place, they contend that as from the expiration of the period of twenty-one years the tenants for life became and are entitled to a full share of the rents and royalties accruing under the mining lease, or, at any rate, to something more than what the Chief Judge has held them entitled to. His opinion was that, so long as the property remained unconverted, the rents and royalties attributable to the settled shares ought to be invested, and that the tenants for life were only entitled to the income arising from such investment.

As regards the first point, their Lordships agree with the Chief Judge in Equity. They are of opinion that, according to the true construction of the will, the trustees are bound to accumulate the rents and royalties received under the mining lease by investing such rents and royalties, and the income resulting from such investment, during the period of twenty-one years from the date of the testator's death.

On the second question their Lordships take a different view

from that which was taken by the Chief Judge in Equity. The period of accumulation was left to the discretion of the trustees, subject to the proviso that it was not to exceed the limit of twenty-one years from the testator's death. The trustees in the exercise of their discretion postponed the conversion of the testator's residuary estate for the full period of twenty-one years. But on the expiration of that period the whole of the estate, according to the direction of the will, ought to have been converted and invested and ready for division. It may be that owing to circumstances it would not have been practicable to have converted the whole estate within the prescribed period, except at an undue sacrifice. In that case, if the administration of the estate had been in the hands of the Court, the Court no doubt would have taken care that the property was not unduly sacrificed. But at the same time it would have been the duty of the Court as far as practicable to place the tenants for life in the same position in which they would have been if the direction of the will had been complied with. It does not seem fair or reasonable that the tenants for life should suffer because the circumstances of the case were such as to justify the trustees in departing from the strict letter of their instructions, or because without any such justification the trustees have neglected the duty imposed upon them by the will.

In this country, in the case of income-producing property directed by will to be converted, but retained for a time unconverted for the benefit of the estate, it has been the practice of the Court to put a value on the property, and to allow the tenant for life out of the income actually produced a sum equal to 4 per cent. on such value. That was the rule laid down by Parker V.-C. in *Meyer* v. *Simonsen* (1), and followed by Lord Cairns in *Brown* v. *Gellatly*. (2)

Their Lordships think that the principle of those cases ought to be applied to the present case. But they do not think that it would be expedient to hamper the Court by laying down any fixed rule as to the rate of interest to be allowed to the tenants for life on the estimated value of the capital of the property.

(1) 5 De G. & Sm. 723. (2) L. R. 2 Ch. 751.

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Their Lordships, therefore, think that the decree of June 11, 1897, ought to be varied by omitting the declaration that the trustees are under no obligation to sell immediately the lands still unsold belonging to the testator's estate, and the declaration that such rents and royalties as have accrued from the said lands since March 20, 1893, form part of the capital of the residuary estate, and ought to be distributed or invested accordingly, and by inserting in lieu of the last-mentioned declaration a declaration that, until the testator's residuary real estate is sold and converted in accordance with the directions of the will, the tenants for life of the settled shares are entitled as from March 20, 1893, to receive out of the rents and royalties accrued and accruing from the said lands such an annual sum as in the opinion of the Court would, under all the circumstances of the case, be a fair equivalent for the annual income that would have been received by them if such residuary estate had been sold on the said March 20, 1893, and the proceeds of such sale had been invested in accordance with the directions of the testator's will, and that there ought to be a reference to the Master in Equity to ascertain the amount payable in accordance with such direction, and that subject thereto the residue of such rents and royalties form part of the capital of the residuary estate, and ought to be distributed and invested accordingly. It will, of course, be competent for the Court, if it thinks it necessary, to require security by insurance or otherwise in order to safeguard the interests of the persons entitled in remainder.

Their Lordships will, therefore, humbly advise Her Majesty that the decree ought to be varied accordingly. The costs of all parties as between solicitor and client will be paid out of the estate.

Solicitors for appellants: *Mander & Son.*

Solicitors for plaintiff respondents: *P. T. Gordon & Son.*

Solicitors for respondents: *Burton, Yeates & Hart, and S. W. Woolmer.*

[PRIVY COUNCIL.]

BENNICOURT . . . . . PLAINTIFF; J. C.*
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AND
LE GENDRE AND OTHERS . . . . . DEFENDANTS. Dec. 12, 20.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Account—Entries Disallowed—Discretion of Court.

Where an account ordered by the Court is limited to pitch dug and won from certain specified lands, entries relating to pitch in other lands must be excluded, and a certificate made in disregard of this rule will be varied by disallowing them.

APPEAL from an order of the Supreme Court (March 9, 1898) affirming a judgment of the Chief Justice (Nov. 11, 1897) directing payment of an amount found due by the defendants on the certificate of Routledge J.

The question decided was whether certain entries included in the accounts should be disallowed as not within the scope of the reference.

The Court below held by a majority that as no objection was taken by the appellant to the procedure which, though irregular, was in fact adopted of dealing with the matters to which those entries related in the course of taking the accounts, the appellant must be held to have acquiesced therein, particularly as he failed to raise any of the points in question before the Chief Justice on the hearing of the motion for judgment.

Montague Lush, for the appellant.
Abraham, for the respondent Ambard.

The judgment of their Lordships was delivered by 1899
Dec. 20.

LORD ROBERTSON. The appellant's claim, as stated in his writ of summons, was "to have an account taken of what is

* *Present:* LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

J. C. 1899 BENNICOURT v. LE GENDRE.

due to the plaintiff under a certain agreement dated in January 1892, for pitch dug and won from plaintiff's land and land of one Eugenia Bennicourt (since deceased) at La Brea." Appearance was entered, but no pleadings were delivered, and the respondents (defendants) were called on by summons to shew cause why an order for the taking of the accounts required by the writ of summons should not be granted. Thereupon it was ordered on October 18, 1897, that the accounts "in this matter" be taken by his Honour Routledge J.

The scope and ambit of the account were thus finally determined by this order; and, in the absence of pleadings, the "matter" to which the order referred was necessarily that stated in the writ of summons. The account to be taken was therefore an account of what was due to the appellant for pitch dug and won from the land of the appellant and the land of Eugenia Bennicourt at La Brea.

Accounts having been given in by the respondents, Routledge J. heard evidence relating to the matters therein disclosed. Possibly on the face of the accounts, but certainly on the evidence, it appeared that there had been brought into the account transactions relating to pitch dug, not from the lands of either of the Bennicourts, but from the lands of one Numa Joasse. Primâ facie those matters were extraneous to the account ordered, which related solely to the lands of the Bennicourts; and in their Lordships' opinion the respondents failed to establish by the evidence any relation between those transactions and the Bennicourts which made them relevant to the account ordered.

At the close of the evidence, this, the true view of the matter, seems from the judge's notes to have been presented on behalf of the appellant, but to have been disregarded by Routledge J., for his Honour proceeded to intimate his decision to certify the account as correct; and in the end this was done. This and the whole of the subsequent proceedings are, in their Lordships' judgment, open to the fatal objection that the judges went outside the true scope of the account, as fixed by the order of October 18, 1897.

In view of this radical defect, it becomes less important to

notice other irregularities in the proceedings. It is quite plain that the application for judgment, of which notice was given on November 5, 1897, was premature, and that the judgment obtained cannot be supported. But, apart from this separate objection, the amended notice to vary the certificate of Routledge J. gave the Full Court the means of restoring to the proceedings their proper limits, in conformity with the original order for an account. Their Lordships consider that this must now be done, and they will humbly advise Her Majesty that the judgment of November 11, 1897, and the order of March 9, 1898, be reversed, and that the suit should be remitted to the Supreme Court with a direction that the certificate should be varied by disallowing all entries in the account relating to the digging of pitch from the lands of Numa Joasse or otherwise than from the lands of the Bennicourts ; and that the respondent Ambard do pay the costs incurred by the appellant from and after October 18, 1897. The respondent Ambard must pay the costs of this appeal.

Solicitors for appellant: *Tucker, Lake & Lyon.*
Solicitors for third respondent: *J. N. Mason & Co.*

[PRIVY COUNCIL.]

J. C.* 1899 Dec. 6, 9.

FALCK . . . . . PLAINTIFF;

AND

WILLIAMS . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Cablegrams—Mistake—Action on Contract—Onus probandi.

Where parties have corresponded by means of a telegraphic code, it is for the plaintiff, in an action for breach of contract, to shew that the proposal made by him and accepted by the defendant is so clear and unambiguous that the defendant cannot be heard to say that he misunderstood it. It is not a matter for the Court to construe.

APPEAL from an order of the Supreme Court (May 19, 1898) discharging a rule nisi obtained by the appellant to set aside a verdict entered for the respondent and enter a verdict for the appellant for 650*l.*, or grant a new trial.

The action was commenced by the appellant on June 3, 1896, against the respondent, and the declaration contained three counts. By the first count the appellant claimed damages for the loss of freight and profits sustained by reason of the respondent's breach of contract to load a cargo of copra on board of the appellant's ship, the *Semiramis*, at the Fiji Islands; by the second for the loss of freight and profits sustained by reason of his refusal to load the said cargo and to perform the said contract, and by the third count for breach of his promise or warranty that he was authorized to make the said contract on behalf of a principal, whose name he did not disclose, whereas, in fact, he was not so authorized.

The above verdict was taken by consent with leave reserved to the plaintiff to move the Court, the jury to be taken not to have decided any fact except the quantum of damages. The

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD DAVEY, and LORD ROBERTSON.

question was as to the effect of certain cablegrams between the parties, which are set out in their Lordships' judgment.

The Supreme Court discharged the rule. The Chief Justice and Stephen J. considered that the appellant and respondent stood in the relation of principal and agent, and that the respondent had never acted in any other capacity than the appellant's agent, and that there was no evidence to support any of the counts of the declaration. Cohen J. considered that the appellant and respondent had never been ad idem inasmuch as the respondent read the cablegram of February 22, 1895, as referring to a Barcelona shale contract, while Buch had, by that cablegram, intended the vessel to be chartered for Fiji; that consequently there was no contract between them; and, further, that the respondent was not liable on the first two counts of the declaration, as he was the appellant's agent, and that he was not liable on the third count, as there was no evidence he had not a principal for the Fiji charter at the time.

Joseph Walton, Q.C., and *C. C. Scott*, for the appellant, contended that the effect of the cablegrams of February 21, 22, and 23, 1895, when correctly and reasonably construed, was that the respondent's offer contained in the cablegram of the 21st to load a cargo of copra at Fiji was accepted for the *Semiramis* by Mr. Buch on behalf of the appellant by his cablegram of the 22nd, and that such acceptance was confirmed by the respondent by his cablegram of the 23rd. The message of the 22nd was the important one, and it was contended that, having regard to its terms, the circumstances under which it was sent, and the course of communications between the parties, its meaning was too plain to be misunderstood; and that, if the respondent did misunderstand, there was no ambiguity in it which accounted for the mistake. The respondent was not justified in putting the construction upon that message which he did. It is a wide alternative between carrying copra from Fiji to Europe and carrying shale from Sydney to Barcelona. There was no reasonable ground for making the mistake, and the respondent is bound by the reasonable construction to be put upon the cablegrams. With

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reference to the position of the agent, reference was made to *Hughes* v. *Graeme* (1); *Kelner* v. *Baxter*. (2)

Cohen, *Q.C.*, and *Butterworth*, for the respondent, were not heard.

1899. Dec. 9. The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Mr. Falck, who was plaintiff in the action and is now the appellant, was a shipowner residing in Norway; Williams, the respondent, was a shipbroker in Sydney, New South Wales.

Through one Buch, who was a shipbroker and chartering agent at Stavanger, in Norway, Falck did a good deal of business with Williams.

Buch and Williams corresponded by means of a telegraphic code, or rather a combination of two codes arranged between them. It was owing to a misunderstanding of a code message relating to one of Falck's vessels called the *Semiramis* that the difficulty arose which led to the present litigation.

Falck sued Williams for breach of a contract of affreightment to load the *Semiramis* with a cargo of copra in Fiji for delivery in the United Kingdom or some port in Europe. Williams understood the proposal made to him to be a proposal for carriage of a cargo of shale to be loaded at Sydney and delivered at Barcelona, and he accepted the proposal under this impression. It was conceded that both parties acted in good faith, and that the mistake was unintentional, whoever might be to blame for the misunderstanding.

The case came on for trial before Owen J. and a jury. A verdict was taken by consent for the defendant. The amount of damages, if damages were recoverable, was fixed by agreement. All other questions were reserved for the Full Court. The Full Court dismissed the action with costs.

The first question is, Was there a contract? If there was no contract in fact, Was the proposal made on Falck's behalf so clear and unambiguous that Williams cannot be heard to say

(1) (1864) 33 L. J. (Q.B.) 335. (2) (1866) L. R. 2 C. P. 174.

that he misunderstood it? If that question be answered in the negative, all other questions become immaterial.

The negotiation in reference to the *Semiramis* began apparently on February 7, 1895, by a telegram from Williams to Buch. Williams offered to load the *Semiramis* with shale at Sydney Wharf for Barcelona "at freight per ton dead weight 27*s*." Buch replied by telegram, dated February 9, asking 2250*l*. as a lump sum for freight. On February 12 Williams offered 27*s*. 6*d*. "per ton dead weight." On the 13th Buch offered to accept that sum on the ship's dead weight "capacity." By telegram on the 14th Williams explained that the rate offered was "per ton dead weight discharged." On the 15th Buch replied that the freight was to be payable "on guaranteed dead weight capacity," or to be a lump sum of 2100*l*., adding a word interpreted to mean "Do your best to obtain our figures, vessel will not accept less." Then, on the 16th, Williams asked what was the guaranteed dead weight capacity of the ship. The answer on the 17th was "1550" tons. On the 18th Williams telegraphed, "Shippers will not pay more than they have already offered at per ton dead weight discharged." He also offered in the same telegram to engage a vessel to load shale at Sydney for Liverpool, at freight per ton dead weight 23*s*.

Having had no reply to his telegram of the 18th, Williams, on the 21st, telegraphed to Buch, "Why do you not reply to our last telegraph? It is very important that we have immediate reply." And he went on to offer to engage a vessel to load copra at two ports in the Fiji Islands, deliverable in the United Kingdom, or some port on the Continent, at 47*s* 6*d*. per ton cargo delivered.

Then we come to the disputed message. On February 22 Buch telegraphed as follows:—"Shale Copyright Semiramis Begloom Escorte Sultana Brilliant Argentina Bronchil." That message with the code words interpreted runs thus: "Shale. Your rate is too low, impossible to work business at your figures. Semiramis. Have closed in accordance with your order.—Confirm. Two ports Fiji Islands. Sultana. Brilliant.

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Argentina. Keep a good look-out for business for this vessel, and wire us when anything good offers."

On the following day Williams telegraphed, "Semiramis, we confirm charter." And, in accordance with his reading of the telegram of February 22, he at once proceeded in the name and on behalf of Falck to charter the *Semiramis* to carry a cargo of shale from Sydney to Barcelona. So the controversy arose. And after mutual explanations or mutual recrimination the action was brought.

Now, it is impossible to contend that there was a contract in fact. Obviously the parties were not at one. Obviously the acceptance by Williams as he meant it to be understood had no connection with or reference to the proposal which Buch intended to make and thought he was making.

But then, said the learned counsel for the appellant, the message of February 22 was too plain to be misread. An intelligent child would have understood it. Business cannot go on if men of business are allowed to shelter themselves under such a plea. Their Lordships are unable to take that view of the disputed message. When the message was sent there were three matters under consideration. There was the Barcelona charter for the *Semiramis*, there was the offer for a Liverpool charter, and there was the Fiji proposal. Of these the most important and the most pressing was the Barcelona charter. True, the negotiation was at a deadlock for the moment, but the parties were so nearly at one that it was only reasonable to expect that they would come to terms, and it is to be observed that during the negotiation, which seems to have been unusually protracted, the *Semiramis* was never once mentioned in connection with any other voyage. Whether the appellant's view or the respondent's view be correct, the telegram of February 22 seems to deal with all three points. The appellant says that the first two words of the code message deal compendiously with both the Barcelona charter and the Liverpool proposal, and that the next three words deal with the *Semiramis*, the last word of the three indicating clearly that she was to be sent to Fiji. The respondent says that the

first two words refer to the Liverpool proposal, the second two to the Barcelona charter, and that the fifth word, "estcorte," is to be read with what follows. Indeed, the whole controversy when the matter is threshed out seems to be narrowed down to this question—Is the word "estcorte" to be read with what has gone before or with what follows? In their Lordships' opinion there is no conclusive reason pointing one way or the other. The fault lay with the appellant's agent. If he had spent a few more shillings on his message, if he had even arranged the words he used more carefully, if he had only put the word "estcorte" before the word "begloom" instead of after it, there would have been no difficulty. It is not for their Lordships to determine what is the true construction of Buch's telegram. It was the duty of the appellant as plaintiff to make out that the construction which he put upon it was the true one. In that he must fail if the message was ambiguous, as their Lordships hold it to be. If the respondent had been maintaining his construction as plaintiff he would equally have failed.

Their Lordships will therefore humbly advise Her Majesty that this appeal must be dismissed. The appellant will pay the costs of the appeal.

Solicitors for appellant: *Snow, Snow & Fox.*
Solicitors for respondent: *Hemsley & Co.*

Dictum of LORD DAVEY, at p. 187, *applied.* A/S TANKEXPRESS. [1948] 2 All E.R. 939.

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BANK OF NEW ZEALAND . . . . DEFENDANTS;

AND

SIMPSON. . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Contract—Construction—Admissibility of Extrinsic Evidence—"Total Cost of Works."

Words with a fixed meaning in a written contract cannot be explained by oral evidence to mean something different from what they express. Where the words used are susceptible of more than one meaning extrinsic evidence is admissible to shew what were the facts which the negotiating parties had in their minds.

Where a written contract provided that the respondent, a railway engineer, should receive extra commission "on the estimate of 35,000*l.* in the event of my being able to reduce the total cost of the works below 30,000*l.*":—

Held, that evidence was rightly admitted to shew to what items of cost the estimate related.

APPEAL from an order of the Supreme Court (Nov. 18, 1898) setting aside the verdict of a jury in favour of the defendants in an action to recover money for extra commission in respect of the making of an extension railway from Rosehill to Pennant Hills and directing a new trial.

The question decided in this appeal was whether the written contract set out in their Lordships' judgment could be rightly construed with the aid of extrinsic evidence.

The railway to which the contract related was completed, and the actual total cost of the works was admittedly 28,116*l.* 16*s.* 4*d.*, that is, a sum below 30,000*l.*, and the respondent therefore claimed under the terms of the contract payment of an additional 1½ per cent. on 35,000*l.*, i.e., 525*l.* The appellants refused payment on the ground that with the addition of the price paid for land for the purposes of the railway

* *Present:* LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

and the respondent's fees under the said agreement the total sum paid by the appellants exceeded 30,000*l.*

At the trial the appellants were allowed to give evidence extrinsic to the written contract, shewing that in arriving at the 30,000*l.* as the total cost of works the cost of the lands bought for the purposes of the railway and the amount of the respondent's fees under the contract were to be included in the calculation. If either the cost of the lands or the respondent's fees are added to the 28,116*l.* 16*s.* 4*d.*, the sum would exceed 30,000*l.* It was not contended, nor was any evidence given to shew, that the words of the contract had any technical meaning other than the ordinary meaning. Cohen J. gave no direction to the jury as to the construction of the contract, but left that construction and the extrinsic evidence to the jury, who found a verdict for the appellants.

The Full Court made absolute a rule nisi to set aside this verdict and for a new trial. They held that the case must be decided on the construction of the letter on January 23, 1894, taken alone, that the expression in that letter "the total cost of the works" was so clear and unambiguous that no extrinsic evidence whatever was admissible to construe it or explain the meaning given to it by the parties, and that "works" must have the same meaning as in the Railway Clauses Consolidation Act, 1845, and was confined to construction works, and that on a new trial the jury ought to be instructed on the admitted facts to find a verdict for the plaintiff.

Asquith, Q.C., and *Vaughan Hawkins*, for the appellants, contended that this order was wrong. The issue which the jury had to try was one of fact, namely, what were the circumstances under which the contract in question was made. Its meaning could not be ascertained without knowing and considering those circumstances. The sense in which the expression "the total cost of the works" was used became under the circumstances a question for the jury. Having regard to those circumstances it was an ambiguous expression, and might or might not include the cost of the land necessary for the construction of the line and the cost of supervision. The

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extrinsic evidence was properly admitted, and whether or not the Court should have construed the contract by its aid, a right construction was arrived at, and the verdict should not have been set aside: *Hussey* v. *Horne-Payne* (1); *Charter* v. *Charter* (2); *Smith* v. *Thompson* (3); *Stucley* v. *Baily* (4); *Macdonald* v. *Longbottom*. (5)

Upjohn, Q.C., and *Danckwerts*, for the respondent, contended that the evidence admitted by the learned judge was all or some of it inadmissible; and that the judge was wrong in leaving the whole case to the jury without any direction as to the construction of the contract. The evidence was inadmissible, for it was not competent to the appellants to vary or explain a written contract thereby. See *Bolchow* v. *Seymour* (6); *Furness* v. *Meek* (7); *Bowes* v. *Shand* (8); *Grant* v. *Grant* (9); *Macdonald* v. *Longbottom* (10); *Charlton* v. *Gibson* (11); *Magee* v. *Lavell* (12); *Mercantile Bank of Sydney* v. *Taylor*. (13) The judge should have held that the contract did not permit of the inclusion of the cost of land acquired for the purposes of the railway or of the respondent's fees in arriving at the total cost of the works. He was wrong in not himself construing the contract.

Hawkins replied.

1900 *Feb.* 17.

The judgment of their Lordships was delivered by

LORD DAVEY. The respondent is an engineer who was employed by the appellants, the Bank of New Zealand, to superintend on their behalf the construction of a railway from Rosehill to Pennant Hills. He sues the bank for extra commission alleged to be due to him from them under the agreement between them. The appeal is from an order of the Supreme Court of New South Wales, dated November 18, 1898, setting aside the verdict of a jury in favour of the appellants

(1) (1879) 4 App. Cas. 311.
(2) (1874) L. R. 7 H. L. 364, 370.
(3) (1849) 8 C. B. 44, 59.
(4) (1862) 1 H. & C. 405.
(5) (1859) 1 E. & E. 977.
(6) (1864) 17 C. B. (N.S.) 107.
(7) (1857) 27 L. J. (Ex.) 34.
(8) (1877) 2 App. Cas. 455, 462.
(9) (1870) L. R. 5 C. P. 727.
(10) 1 E. & E. 976, 987.
(11) (1844) 1 C. & K. 541.
(12) (1874) L. R. 9 C. P. 107, 112.
(13) [1893] A. C. 317.

and directing a new trial. The question between the parties is exclusively one of the admissibility of certain evidence.

On January 22, 1894, an interview took place between the respondent and Mr. Chapman, the manager of the bank. On the following day the respondent wrote to Mr. Chapman as follows :—

"113, Phillip St.,
"Sydney, N.S.W.,
"January 23rd, 1894.

"To I. Chapman, Esq.,
"Manager of the Bank of N. Zealand Estates
"Coy., Ltd.,
"Pitt Street, Sydney.

"Dear Sir,

"In reply to your inquiry as to the engineering expenses of the construction of the first section of the Pennant Hills and Dural Railway, I beg to inform you that I am prepared to undertake the work on the following terms, which shall include the payment of all necessary professional assistants and inspectors :—

"For contract specification and drawings, 2½ per cent. on 35,000*l.*

"For supervision of work, 5 per cent. on ditto.

"For measurement of work, 1 per cent. on ditto.

Provided I should be allowed another 1½ per cent. on the estimate of 35,000*l.*, in the event of my being able to reduce the total cost of the works below 30,000*l.* I propose to effect this saving by extra labour in making comparative drawings of works for the sake of economy and not by sacrificing the character of the work and for this reason I do not recommend the adoption of any rail under 71½ lbs.

"I shall be glad to hear from you in reply to the terms contained herein.

"Yours very truly,
"(Signed) B. C. Simpson."

No reply to this letter was written, but the offer contained in it was verbally accepted on behalf of the bank, and it admittedly expresses the terms of the contract between the parties.

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The works were proceeded with under the respondent's supervision and the railway was completed. The cost of constructing the railway exclusive of the purchase of land was 28,116*l.* 16*s.* 4*d.* The cost of the land purchased was 5774*l.* 12*s.* 11*d.* The amount of the respondent's commission at 8½ per cent. on 35,000*l.* was 2975*l.* There were further fees paid to the respondent in connection with the purchases of land and other expenses, bringing the total up to 43,174*l.* 19*s.* 5*d.* If, therefore, "the total cost of the works" referred to in the letter of January 23, 1894, included the cost of the land and the respondent's commission of 8½ per cent., or either of those sums, he did not succeed in reducing the cost below 30,000*l.*, and the respondent was not entitled to his extra commission of 1½ per cent.

The respondent contended that according to the true meaning of the agreement the estimate of 35,000*l.* did not include the cost of the land purchased or the amount of his commission, and, on February 22, 1898, he commenced an action to recover 525*l.*, the amount of the extra 1½ per cent.

The action was tried by Cohen J. with a jury. The respondent gave evidence and stated his version of what took place at the interview of January 22, 1894, and of the intention of the parties. Mr. Chapman was called by the bank and gave his version of what had taken place between the respondent and himself, and the respondent was called in reply. Chapman's evidence was objected to by the respondent's counsel, but admitted by the learned judge. The appellant's counsel also tendered a certain circular which had been prepared by the respondent and issued by him with the concurrence of the bank before the date of the agreement, and certain correspondence between the parties which it was said tended to support the view of the appellants. This evidence was also objected to by the respondent's counsel, but admitted by the learned judge.

The circular in question stated that the "estimated cost of the line" (meaning the line in question) was 35,000*l.*, but that by economy in works it would probably be constructed for less, and, after giving figures shewing an estimated net revenue of 1913*l.*, proceeded thus: "Assuming that the cost will be

35,000*l.* the net revenue will yield a dividend of 5½ per cent. on the capital."

At the close of the trial (after the jury had retired) respondent's counsel asked the learned judge to construe the letter of January 23, and direct a verdict for the respondent. The learned judge declined, and the jury gave a verdict for the appellants.

The respondent moved for and obtained a rule nisi for a new trial on grounds which fully raised the questions between the parties and need not be stated at length. The rule was made absolute. The learned Chief Justice in his judgment held that according to the true construction of the letter "the total cost of the works" meant the cost of the actual construction of the railway, and could not with legal certainty be applicable to both the total cost of the works (alone) and also to the cost of the works plus the cost of the land plus the engineer's commission, and that, therefore, the extrinsic evidence objected to ought to have been rejected. The Chief Justice added that they could not understand any person receiving the letter after due consideration being misled by its contents. Their Lordships cannot agree with the views so expressed.

The respondent admitted in his evidence (as indeed is plain without his admission) that what was proposed to be reduced was the 35,000*l.* to below 30,000*l.* or (in other words) that the two sums are coextensive. It is not, therefore, a mere question of the meaning of the words "the total cost of the works" standing alone, but the meaning of "the estimate of 35,000*l.*" has also to be considered. These words point to something which was known to and in the contemplation of both parties to the contract, and with reference to which they contracted; and, in order to construe and apply the contract, you must ascertain what was included in "the estimate of 35,000*l.*" on the reduction of which the contract depended. Extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about.

The rule is thus stated in Taylor on Evidence, 8th ed. vol. ii. s. 1194: "It may be laid down as a broad and distinct rule of

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law that *extrinsic evidence* of every *material fact* which will enable the Court to *ascertain the nature and qualities* of the subject-matter of the instrument, or, in other words *to identify the persons and things* to which the instrument refers must of necessity be received." In *Grant* v. *Grant* (1) Blackburn J. quoted judicially the following passage from his valuable work on Contract of Sale (p. 49) :—

"The general rule seems to be that all facts are admissible which tend to shew the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to shew that the writer intended to use words bearing a particular sense are to be rejected."

Various cases may be cited in which these principles have been applied. In *Ogilvie* v. *Foljambe* (2) Sir William Grant says: "The defendant speaks of 'Mr. Ogilvie's house,' and agrees 'to give 14,000*l.* for *the premises*,' and parol evidence has always been admitted in such a case to shew to what house and to what premises the treaty related." In *Macdonald* v. *Longbottom* (3) Lord Campbell says: "This was an offer made to the plaintiffs and accepted by them of 16*s.* per stone for 'your wool,' to be delivered in Liverpool. The only question, therefore, is, What was the subject-matter of the contract described as 'your wool'? I am of opinion that when there is a contract for the sale of a specific subject-matter oral evidence may be received for the purpose of shewing what that subject-matter was of every fact within the knowledge of the parties before and at the time of the contract. Now Stewart, the defendant's agent, had a conversation, before the contract, with one of the plaintiffs, who stated what wool he had on his own farm and what he had bought from other farms. The two together constituted 'his wool'; and, with the knowledge of these facts, the defendant contracts to buy 'your wool.' There cannot be the slightest objection to the admission of evidence of this previous conversation, which neither alters nor adds to the written contract, but merely enables us to ascertain what

(1) L. R. 5 C. P. 727, at p. 728. (2) (1817) 3 Mer. 53; 17 R. R. 13.
(3) 1 E. & E. 977.

was the subject-matter referred to therein." And in *Smith* v. *Thompson* (1) evidence was admitted of previous letters to shew that a sum of money transmitted by an employer to his clerk for "business purposes" was properly applied by the clerk in payment of his own salary.

Of course, if the words in question have a fixed meaning not susceptible of explanation, parol evidence is not admissible to shew that the parties meant something different from what they have said. That is not so in the present case. Their Lordships think that "the total cost of the works" may mean the cost to the owner of the completed railway, and they think that any person receiving the letter with a knowledge of the previous circular and of the conversation of the previous day according to Chapman's version (which the jury evidently believed) might and would have so understood it.

Their Lordships are therefore of opinion that the evidence objected to was admissible, and the learned judge was right in the course which he took at the trial of declining to construe the contract without the assistance of the jury. The weight and import of the evidence were for the jury to consider, and their verdict in favour of the present appellants is decisive of the view they took as to the effect of it. In the opinion of their Lordships there are no sufficient grounds for disturbing the verdict of the jury, even if they dissented from it, which they are far from doing.

Their Lordships will therefore humbly advise Her Majesty that the order of the Supreme Court be reversed, and instead thereof it be ordered that the rule nisi and the rule absolute therein referred to be discharged with costs to be paid by the respondent. The respondent will also pay the costs of this appeal.

Solicitors for appellants: *Light & Galbraith.*
Solicitors for respondent: *Bell, Brodrick & Gray.*

(1) 8 C. B. 44.

[PRIVY COUNCIL.]

J. C.* 1899 Dec. 14, 15, 16, 20. 1900 Feb. 17.

FORMAN & CO. PROPRIETARY, LIMITED Plaintiffs;

AND

THE SHIP "LIDDESDALE" . . . . Defendant.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Contract—Authority of Agent—Lump Sum—Variation—Ratification.

Where the plaintiffs contracted with the agent of an absent shipowner to effect certain specified repairs (all confined to damage by stranding), and instead of doing the work as stipulated alleged that they had, on the agent's authority, done the equivalent thereto or better, and in the same contract stipulated that they should be paid for repairs due to deterioration at scheduled prices stated by them:—

Held, that, it appearing that the agent's authority to their knowledge was limited to the said specified repairs, they could not recover on the contract, which was an entire one, and in its entirety had never been performed:

Held, further, that the shipowner having taken the ship as repaired and sold it, did not thereby ratify the contract.

Appleby v. *Myers*, (1867) L. R. 2 C. P. 651, followed.

Appeal from part of a decree of the Vice-Admiralty Court of Victoria (May 5, 1898), whereby it was pronounced that the sum of 1700*l.* 18*s.* 5*d.* only was due to the appellants for necessary materials, work, and repairs, other than those supplied and executed under the contract dated December 10, 1896, and sufficiently set out in their Lordships' judgment; and that nothing was due in respect of such materials, work, and repairs supplied and executed under and in pursuance of such contract.

The appellants having executed, under the circumstances stated in their Lordships' judgment, certain repairs to the *Liddesdale*, began this action on February 8, 1897, by writ of summons, claiming 15,567*l.* 8*s.* 9*d.* for necessaries supplied and repairs done to the *Liddesdale*, or a sum exceeding by 9571*l.* 18*s.* 9*d.* the lump sum (5995*l.* 10*s.*) mentioned in the

* *Present:* Lord Hobhouse, Lord Davey, Lord Robertson, and Sir Richard Couch.

contract of December 10, 1896. By paragraph 4 of the petition the appellant alleged:—

"The said materials were so supplied and the said work and repairs executed partly under and in pursuance of a written contract, consisting of a tender in writing by the plaintiff, dated December 8, 1896, to do certain portion of the works and supply certain portion of the said materials, in accordance with certain written specifications and conditions referred to in such tender (which tender was accepted in writing by the master upon December 10, 1896), partly in accordance with certain schedule rates referred to in the documents hereinbefore mentioned, and partly in pursuance of orders given by the master during the progress of the contract works, to do certain other works not mentioned in the contract."

The amounts claimed under each head of the appellants' claim were as follows:—

	£	s.	d.
1. Contract for repairs	5,995	10	0
2. Work not included in contract, but claimed under schedule rates	6,847	12	6
3. Other repairs	2,724	6	3
Total claim	£15,567	8	9

The answer of the respondent, the owner of the ship, was as follows: (1.) As regards the bulk sum contract: that the appellant had not performed his contract. (2.) As regards the schedule rate repairs, and (3.) the other repairs: that they were not necessaries; that they were not ordered by any one having authority on behalf of the owner. The respondent further pleaded that, so far as the plaintiffs' claim related to extras, there were no written orders or prices agreed, as required by the conditions of the written contract which the parties had entered into.

By their reply the appellants alleged that all deviations, alterations, and extras were acquiesced in and ratified and approved by the respondent; which averment was denied by the respondent in his rejoinder.

The Chief Justice on the evidence accepted the respondent's

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contentions, and being further of opinion that there had been no holding out by the respondent of any person as having authority to order the deviations from the specifications above mentioned, nor any ratification or acquiescence in the said deviation by the respondents, he held that the appellants were not entitled to recover the contract price or any part of it. He also disallowed certain items, one on the ground that the work done was a deviation from the specification which had not been authorized in writing pursuant to clause 8 of the contract. He disallowed other works claimed for on the ground that they were not "necessaries" within the implied authority of the master to order, and that clauses 8, 23, and 24 of the specification, so far as they purported to enable the respondent's agent to incur expenditure beyond 6000*l.* or for repairs not caused by the stranding were unauthorized although a regular order in writing was given for them. Claims for extras outside the scope of the specification were also disallowed.

Carver, Q.C., and *Mansfield*, for the appellants, contended that the contract of December 10, 1896, was binding on the respondent as having been made by a duly authorized agent. The master of the ship had actual authority to enter into that contract and bind thereby the owner of the vessel. Otherwise he had apparent authority, and the respondent acquiesced in and ratified the contract. With regard to the master's general authority to order necessaries, and as to what are necessaries, see *Webster* v. *Seekamp* (1); *The Riga*. (2)

Mondel v. *Steel* (3) is an authority that where a contract is for a lump sum, proof of a breach of contract was only ground for deducting from the agreed price the difference between the value of the ship as she was at the time of delivery from what she would have been if the contract had been duly performed: see also *Tharsis Sulphur Co.* v. *M'Elroy*. (4) The departures from the specifications by the appellants were sanctioned by the master and the surveyors who inspected the work on the respondent's behalf as it went on, and no objection to the manner in which

(1) (1821) 4 B. & A. 352; 23 R. R. 307.
(2) (1872) L. R. 3 A. & E. 516.
(3) (1841) 8 M. & W. 858.
(4) (1878) 3 App. Cas. 1040.

the work was being done was raised by them. By the terms of the contract the sanction of the surveyors to alterations in detail was not necessarily to be given in writing. Even if the appellants were not entitled to the contract price, they were entitled to payment for the value of the work done of which the respondent had accepted the benefit, having taken over the ship and sold it with its value enhanced by its having been repaired by the appellants. Reference was made to *Appleby* v. *Myers* (1); *Munro* v. *Butt* (2); *Sumpter* v. *Hedges* (3); *Bartlett* v. *Stanchfield*. (4) As to the authority which it should be implied was vested in the agent from the conduct of the parties and the nature of the business, see *De Bussche* v. *Alt* (5); and as to the powers of the master of a ship, see *The Karnak* (6); *The Albert Crosby*. (7) See also *Burn* v. *Miller*. (8)

Joseph Walton, Q.C., *English Harrison, Q.C.*, and *Leck*, for the respondent, contended that the evidence shewed that the appellants did not perform the written contract so as to become entitled to the price stipulated. As to the lump sum, it was shewn that in many important respects the appellants had failed to carry out the work which was necessary to entitle them to payment. For instance, they failed to renew twenty steel shell plates, and merely straightened the old bent plates and put them back. The new girder floor plates supplied in place of those which the appellants failed to straighten were different in design and scantling from the original plates; the plate 2 D was not replaced by a new steel plate, and the ballast tanks were not painted at all, but only cement-washed. The evidence also proved that no one had authority to order or allow these alterations or deviations from the contract, and no order in writing as stipulated by the specification was ever obtained in respect of them. It was also proved that the repairs to the girder plates were so done as to substantially alter the original design of the ship, contrary to the provisions of the contract, and that there had been no acquiescence, acceptance, or approval

(1) L. R. 2 C. P. 651.
(2) (1858) 8 E. & B. 738.
(3) [1898] 1 Q. B. 673.
(4) (1889) 148 Massachusetts Rep. 394.
(5) (1878) 8 Ch. D. 286, 310.
(6) (1868) L. R. 2 A. & E. 289, 300.
(7) (1870) L. R. 3 A. & E. 37.
(8) (1813) 4 Taunt. 745; 14 R. R. 655.

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by the respondent of any of the alterations or deviations from the terms of the contract. The other repairs under the schedule rates were not necessaries, nor were they repairs due to stranding damage, which alone was compulsory on or desired by the respondent; and neither the master nor any other person had authority to order such repairs to be done. Having regard to the terms of the appeal, no question arises now as to any repairs done except as to those done under the written contract, and as to these the Court below was right in holding that nothing was due, for neither the materials nor the work was supplied in pursuance of the contract. The authorities relied upon were *Munro* v. *Butt* (1); *Thomas* v. *Lewis* (2); *Sumpter* v. *Hedges* (3); *Sinclair* v. *Bowles* (4); *Arthur* v. *Barton* (5); *Gunn* v. *Roberts*. (6)

Carver, Q.C., replied.

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Feb. 17.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. This suit is in form a proceeding in the Vice-Admiralty Court to make the ship *Liddesdale* answerable for the cost of repairs executed upon her. In substance it does not differ from other litigations between one who has done work on a chattel and the owner of the chattel who denies his liability to pay for it. The plaintiffs, now appellants, are a joint stock company, who carry on the business of building and repairing ships at Melbourne. The *Liddesdale*, the nominal defendant and respondent, is a British steamer built of steel. The real defendant, her owner, is Mr. Robert Mackill, surviving partner of a firm of merchants carrying on business in Glasgow. Her master was Captain Alexander Clark.

In the month of October, 1896, the ship ran aground off the coast of West Australia, but she was got off, and continued her voyage to several West Australian ports. Having then discharged her cargo, she made for Sydney to get a fresh one, but on the way put into the harbour of Melbourne, which she reached on November 25. When there she was examined by

(1) 8 E. & B. 738.
(2) (1878) 4 Ex. D. 18.
(3) [1898] 1 Q. B. 673.
(4) (1829) 9 B. & C. 92; 32 R. R. 589.
(5) (1840) 6 M. & W. 138, 143.
(6) (1874) L. R. 9 C. P. 331.

the Marine Board of Victoria, who detained her, and required that the damage done to the structure of the vessel by its stranding should be repaired before she could be allowed to depart. That led to a correspondence by cable between Captain Clark and the defendant, out of which arises the most material question in the suit, namely, what authority was vested in the ship's master.

The messages which passed are set out consecutively and in the most convenient form in the judgment of the learned judge below. They have been read frequently during the argument, and need not be quoted at length now. The defendant was very anxious that nothing should be done to the ship beyond what would enable her to come safely home with a cargo, such as replacement of broken plates and so forth, and he forbade Clark to make contracts before being authorized to do so. Clark, on the other hand, informed him that Lloyd's agent and the Marine Board held that more permanent repairs were necessary for safety. Upon this the defendant sent a message dated December 6, "Arrange as best you can permanent, must do nothing whatever beyond repairing stranding damage."

In the meantime Clark had got specifications of the work necessary to repair the stranding damage, and had advertised for tenders. The plaintiffs' tender was the lowest. An interview took place on December 8 between Mr. Forster, the managing director of the plaintiffs, and Captain Clark, and Mr. Brodie, who represented the firm of Sanderson & Co. That firm acted as the defendant's agents in the matter of the *Liddesdale*, and in their office all the negotiations took place. There is no discrepancy in the accounts of this interview. Some discussion took place as to a schedule of prices for possible additional work; and when that had been settled, Clark and Brodie informed Forster that they could not accept the plaintiffs' tender without authority from home, but that they would recommend it.

Brodie and Clark cabled at once to the defendant, "Lowest reliable tender 6000*l*. Twenty days. Repairs commence acceptance tender."

On the 10th defendant replied, "Contract with Lloyd's

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agent's approval. Twenty days, payment must be accepted by contractor, in banker's guaranteed drafts, ninety days' sight, on Clydesdale Bank, London."

The parties met again at Sanderson's office after receipt of the message of the 10th. All agree that Mr. Warne, the secretary of the plaintiffs' company, objected to the mode of payment stipulated for by the defendants, saying that the payment ought to be in cash, but that his objection was overcome, and the contract then signed. Clark adds that when Warne's objection was made, he answered it by saying, "That is all the authority I have."

By the terms of the contract the plaintiffs undertake to effect repairs as per specifications for the sum of 5995*l.* 10*s.* in twenty working days. The repairs specified are strictly confined to the damage by stranding. By clause 14 it is said that "this contract to repair and renew shall mean that the vessel shall be restored in every respect to her original condition prior to the accident." There are two clauses relating to repairs not specified, which have been the subject of a great deal of discussion both in the Court below and at this bar. They run as follows:—

Clause 8: "The contractor shall not make any alteration or deviation from the specification agreed upon, nor shall he be entitled to make any charge or claim for extras or for anything whatever beyond the lump sum agreed upon, unless he obtain the written sanction of the captain or his agents at the time of making such additions or alterations which shall be at a price agreed upon."

Clause 23: "The contractor to state schedule prices as follows for any work that may be required to be done in addition to what is attributable to damage, that is to say, for any repairs due to deterioration in water ballast under boilers."

The claim made by the plaintiffs is divisible into three portions. First, they claim the lump sum mentioned in the contract. Secondly, they claim for extra work at the schedule rates stated by them under clause 23 of the contract. And, thirdly, they claim for extra work not specified in the contract

at all, but done in pursuance of orders given by Clark during the progress of the work, and said to be authorized either by his inherent authority, or by virtue of clause 23 in the contract. The whole sum claimed is 15,587*l.* and a fraction.

As regards the first portion of the claim, the defendants say that the lump sum never was earned because the stipulated work was not done; and indeed the plaintiffs do not assert that it was. What they allege on this point is that the equivalent of the stipulated work, or something better, was done, and that they had authority for the variation. As regards the second portion, the defendant insists that Clark did not order the work, and that, if he had done so, he had no authority to do it. As regards the third portion, there has been a separate dispute on each item with respect to its necessity for the liberation or for the safety of the ship and, with respect to Clark's orders for it, whether given in fact and whether binding on the defendants in law. The learned judge below disallowed the whole of the two first portions of the claim. Of the third portion, after detailed examination, he allowed items amounting to about 1700*l.* and disallowed the rest. The defendants put in counter-claims for penalties on account of demurrage and for damages, but all were disallowed.

The third portion of the plaintiff's claim, which was the subject of a great deal of argument during the opening of this appeal, may be disposed of at once. The defendant meets it by the preliminary objection that it is not the subject of appeal; and in this their Lordships agree with him. The decree is as follows:—

"The judge having heard counsel for the plaintiff and the defendant respectively pronounced the sum of one thousand seven hundred pounds eighteen shillings and fivepence (1700*l.* 18*s.* 5*d.*) to be due to the plaintiff in respect of that part of its claim which claimed for necessary materials, work, and repairs other than those supplied and executed under or in pursuance of the written contract and conditions and specifications mentioned in paragraph 4 of the petition, together with the costs of the action up to the nineteenth day of May, 1897, and

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pronounced that nothing was due in respect of such materials, work, and repairs supplied and executed under and in pursuance of such written contract and conditions and specifications, and he condemned the defendant and its bail in the said sum and in such costs as aforesaid."

This decree bears date May 5, 1898. On May 30 the plaintiffs gave the notice which is the foundation of this appeal:—

"Take notice that Forman & Co. Proprietary, Limited, plaintiff, appeals from so much of the decree of the judge of said Court, made the fifth day of May, 1898, as pronounced that nothing was due in respect of materials, work, and repairs supplied and executed under and in pursuance of the written contract and conditions and specifications mentioned in paragraph 4 of the petition and as deprived the plaintiff of costs.

"Dated the thirtieth day of May, 1898."

It is quite clear that the appellants were then satisfied with the decree except as regards the contract with its conditions and specifications, and the claims arising thereunder; that they did not intend to appeal as to that which lay outside the contract; and that the defendant has been right in avoiding discussion of this part of the controversy, both in his lodged case and at the bar.

As regards the work done, no doubt exists but that it was good work and that it added value (how much it is impossible to say) to the ship, which after release from arrest was sold for upwards of 18,000*l.* Indeed, the defendant tendered the sum of 4786*l.* 10*s.* on May 19, 1897, and on the plaintiffs' refusal paid that sum into court. As the litigation proceeded, however, and the defendant learned more of the details of the case, he was led to dispute more of the plaintiffs' claims, with the result above mentioned.

This will be the convenient place to state their Lordships' view of the authority possessed by Captain Clark, because both on the first portion of the claim and on the second portion the question of the validity of an order is continually mixed up with the question of fact whether or no it was given; and

because for every failure to comply with the contract and for every excess of work beyond the specified repairs the plaintiffs seek to shelter themselves under the authority of Clark, either directly given or given through Mr. Watson, who was Lloyd's agent. It is true that instructions conveyed by cable in abbreviated language or by artificial and cryptic symbols are open to doubts and disputes. In this case the learned judge has pointed out that the message of December 10, 1896, is susceptible of various meanings. But connecting it with the whole series the meaning is reasonably clear. It means that Clark is to contract on the footing mentioned in his last message of the 8th, provided that the tender is approved by Lloyd's agents; and with the addition that the payment is to be made by draft. And it is made clear by the defendant's message of the 5th that the tender, though it may provide for repair of a permanent character, is not to provide for the repair of any damage except the damage by stranding. Clark, then, was limited in respect of price to 6000*l.*, in respect of the nature of repairs to stranding damage, in respect of time to twenty days, and in respect of judgment on details to things approved by Lloyd's agent. Within these limits it seems to their Lordships that Clark was free to contract, and that where he was free to contract he might vary the contract as might be found expedient in the progress of the work. But he could not transcend the limits imposed upon him by his principals.

As regards the most important of these limits, it is clear that the defendant had an eye not only to expense, which he says is excessive in Melbourne, but to the liability of the underwriters, and attached great importance both to the approval of Lloyd's agent and to the complete separation of stranding damage, for which the underwriters would be liable, from other damage for which they would not be liable.

The plaintiffs contend that they are not bound by all that passed between the defendant and his agents in Melbourne; that they knew nothing of such matters except the message of December 10, which apparently gave Clark a free hand to make any contract whatever, subject only to the approval of

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Lloyd's agent, and to the conditions respecting time and the mode of payment. The answer is, that Clark had refused to make a contract except such as his principal might authorize; that the plaintiffs knew that Clark and his principal were in correspondence by cable; they knew that the message of the 10th was in answer to Clark's advice of their tender sent on the 8th; if they did not really know the extent of Clark's authority, it was their business to learn it; and thus, that whatever restrictions existed between Clark and his principal were equally binding as between his principal and the plaintiffs.

Now, that the plaintiffs have not done the work specified by the contract is undisputed. The learned judge mentions four matters in which they have failed. Two of them are apparently trivial, and such perhaps as would not by themselves have any greater effect than to give the defendants a cross-claim if damaged by the variation. The other two are much more important. Under clause 15 the plaintiffs were bound to renew twenty of the injured steel shell plates, and to straighten thirty-seven others, or if they would not bear straightening to renew them at a stated price. This work of renewal the plaintiffs never did, and never could have done, at least within the twenty days, and never intended to do. Forster says, "such plates could not be obtained in this country, the only means of getting them would be from England. . . . . It certainly looked a bit awkward for us if we had to carry out contract as to renewing plates, as they were not to be got here. If surveyor stuck out and refused us time to straighten old plates and put them on instead of renewing, it would have been very awkward for us. . . . . We calculated we would not have to carry out our contract fully. I see in estimate we charge twenty plates to be renewed; we thought we could get out of that and so kept price pretty low."

The plaintiffs had not any kind of authority for this variation. The two persons from whom they claim to have received authority for some other unspecified work were, first Captain Clark, and secondly Mr. Watson, Lloyd's agent. Forster says: "In

January I went with Watson, explained how the plates were coming in. Clark was staying at Malvern. I said, 'I think all the plates will work in and straighten well.' He said, 'That is first-rate.' . . . 'After contract signed' I had no conversation with Watson as to replacing the straightened plates, instead of new ones. I later on told Clark I was putting them on. This was all that occurred between me and any of them as to this."

Under clause 16 a number of girders or plate frames, more or less damaged and buckled, were to be straightened where practicable, and to be renewed where the buckles could not be satisfactorily taken out. The evidence is somewhat confused in parts, but it clearly shews the following things: that all these girders could have been straightened; that some were not touched by the plaintiffs at all, being, as Forster says, still straight; that some were straightened, but in the process it was found that the material was deteriorated; that Watson thought it expedient though not necessary to substitute new material; that iron was substituted for steel; and that the deterioration was not due to stranding damage.

From the evidence of Lang, one of the plaintiffs' foremen, it would seem that Clark either ordered this renewal to be done or agreed that it should be done. It is also made clear that the substitution of iron for steel not only added to the weight and to the expense, but altered the structure of the vessel—to her advantage, as the plaintiffs contend, but, as the defendant says, causing a rigidity in her framework which is a source of danger to her. That is a matter on which opinions vary; but there is no dispute that the alteration is not consistent with the plaintiffs' obligation to restore the vessel to her original condition prior to the accident.

The plaintiffs excuse their failure to do this by alleging the order of Clark. But, assuming in their favour that such an order was given, the question of Clark's authority comes in. It is argued for the plaintiffs that clause 8 of the contract contemplates his giving such an order as this, and that, though he gave no written order as that clause requires, he could vary the contract in that respect as in others, and by his conduct did

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so vary it. It appears to their Lordships that the object of clause 8 was to prevent the contractors from making claims on account of extra work unless they had a written order for it. It was quite reasonable to contemplate that in the course of repairing further stranding damage might be disclosed, or that variations of detail might be expedient. Under clause 8 the plaintiffs could not do work of this kind, or at least could not charge for it, unless they got Clark's written order. The clause was evidently intended as a check on the contractors, and to prevent disputes about what the parties must have contemplated would be small matters. But it was not calculated or intended to enlarge Clark's authority, nor, even if so expressed, could it have that effect as against his principals. It is now used to justify claims against the defendant for a class of repairs which he had expressly prohibited. Authorized repair of stranding damage has passed into forbidden repair of deterioration, which has the effect apparently (for the two classes of claim are so mixed up that it is difficult to keep them apart) of doubling the stipulated charge. In fact, so far as this line of argument is applied to the lump sum, it tends to shew how completely the contract was broken, and how impossible it is for the plaintiffs to maintain that they have given the article for which the defendant bargained and promised to pay the lump sum.

In the case of *Appleby* v. *Myers* (1) Lord Blackburn mentions two conditions under which a contractor for a lump sum who has not performed the stipulated work can recover something under his contract. He can do so if he has been prevented by the defendant from performing his work, or if a new contract has been made that he shall be paid for the work he has actually done. Their Lordships are clearly in agreement with the learned judges below that there is no evidence to support either of these conditions, and it is not necessary to travel into further detail upon this point.

Beyond the stipulated price the plaintiffs claim the sum of 6754*l.* for new girder plates, angle irons, and tank top repairs. There is great difficulty in understanding how far the claim for

(1) L. R. 2 C. P. 651.

this work is identical with the claim for work done to earn the stipulated price under the contract as varied in the way for which the plaintiffs contend. The learned judge below appears to have found the same difficulty, for he says that, having considered the girder plates and angles as authorized alterations of the specified contract, he has to consider them again as extras. On his view of the case and on that taken by their Lordships it is not necessary to work out this problem, nor is it necessary to examine minutely into the questions what authority can be imputed by law to Clark, or what particular items are covered by his orders, or what was the necessity for each item. All this has been done by the learned judge with great care, and with results adverse to the plaintiffs. In the judgment of their Lordships, Clark had no implied authority beyond the limits which they have before stated—namely, to adjust details falling within the terms of that contract which he had express authority to make. He was not only not authorized, he was expressly forbidden, to effect repairs of any damage except that by stranding.

In point of fact he did send a message on January 4 as follows: "Under engines boilers tank top damage excessive condemned estimate total expenses will be 11,000*l.* propeller blades engines boilers."

The answer came next day:—

"Original contract must not be exceeded if tank top damaged cut off filling pipe closing tank Lloyd's will allow it. Are you following out instructions telegram 5th December. Repair nothing beyond stranding damage." That is all in accordance with the defendant's previous instructions. Clark seems not to have given any order as to the tank tops. If and so far as he gave orders for repairs wanted on account of deterioration alone, he acted contrary to instructions, and his orders cannot be of any avail to the plaintiffs, who knew that he was acting under express instructions, and must be held bound by them.

On this part of the case the plaintiffs rely also on clause 23 of the contract. They say that it gave them a right to believe that if Clark and Watson approved of work done in addition to

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what is attributable to damage (which must mean damage by stranding), it would be properly chargeable against the ship at schedule rates. Their Lordships do not so read the clause. It binds the contractor to certain prices for additional work if required, but the requisition must still be made by due authority, and that was, as regards deterioration, the authority of the defendant only. If the clause means what the plaintiffs contend for, then Clark had no right to insert such a clause. He could not give himself indirectly an authority to order repairs for which he had been forbidden to contract directly.

Then the plaintiffs rely on the fact that the defendant took the ship and sold it; this being as they contend an acquiescence by the defendant, and a ratification of all that the plaintiffs had done. The mere fact that the defendant took the ship which was his own property and made the best he could of it cannot give the plaintiffs any additional right. It is not like the case of an acceptance of goods which were not previously the property of the acceptor. But the plaintiffs connect the possession and sale of the ship with communications which, as they say, shewed that the defendant had knowledge of the true state of the case. The messages passing on January 4 and 5 have just been cited for another purpose. On the 6th Clark cabled as follows :—

"Contract provides renewals schedule prices. Girders plates under boilers more badly damaged than first anticipated much deteriorated. Could not have remained in their present condition. Surveyors order renewal. Will make what repairs are absolutely necessary only through stranding."

On the 28th the defendant wrote, being then under the impression that the cost of repairs was 11,000*l.*, which he treats as falling upon the underwriters. That, however, would not be the case with the cost of repairing deterioration. Up to that time nothing had been said to warn the defendant that he would be charged for repair of deterioration, and Mr. Mackill says that he had no suspicion of it.

After he had written his letter of January 28 he received a message bearing the same date from Clark, which informed him that the expense would be 16,000*l.*, and some particulars

were added which shewed that it was for other than stranding damage. Upon that the defendant took legal advice and resolved to dispute the claim. Ever since that time the parties have been hostile. There is nothing in these communications to shew acquiescence or ratification. When the defendant wrote under the impression that 11,000*l.* would be charged he believed that it was all for stranding damage. He never in any way accepted the charge of 16,000*l.* It was only in the course of the action that he learned that the plaintiffs had failed to perform their contract. The plaintiffs have not been led by the defendant's conduct to do anything prejudicial to themselves, and their Lordships cannot see in what respect the defendant has precluded himself from disputing his legal liability.

There is one item of the plaintiffs' claim which the learned judge, though he has disallowed it, has treated as standing on a peculiar footing. It is a small item for a single plate valued at 80*l.* It is one of the repairs provided for by clause 15, and it was done efficiently, but not according to contract. It seems to their Lordships that the plaintiffs cannot on the most favourable view of the evidence claim more than that the plate should be taken as having been repaired according to contract. But then the price is covered by the lump sum. There is no doubt that many repairs were executed according to contract; but the cost cannot be recovered, because the contract is an entire one, and in its entirety has never been performed. There is no reason why this particular plate should be differently treated.

The result is that their Lordships concur with the learned judge below in his conclusions, and for the most part on the same grounds as are taken by him. It seems hard that the plaintiffs should not be paid for work which they have done; but such is the effect of contracting to work for a lump sum and failing to do the work. It would be hard upon the defendants if they were made to pay for work which they did their best to prevent. And it must be said that the plaintiffs have done a great deal to bring the hardship upon themselves by careless, irregular proceedings in relying on verbal orders, or on

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the mere presence and knowledge of Watson and Clark, as if they were equivalent to orders coming from the owners, whom the plaintiffs knew to be directing the business.

Their Lordships will humbly advise Her Majesty to dismiss this appeal, and the appellants must pay the costs.

Solicitors for appellant: *Wadeson & Malleson.*

Solicitors for respondent: *Lowless & Co.*

[PRIVY COUNCIL.]

J. C.* 1899 Nov. 29. 1900 Feb. 17.

MUNICIPAL COUNCIL OF SHANGHAI . PLAINTIFFS;

AND

McMURRAY . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF CHINA AND JAPAN.

Shanghai Land Regulation VI. of 1869—*Land taken for Public Purposes—Construction—"Extension" of Roads.*

Shanghai Regulation VI. of 1869 authorized the municipal council of that place to take the respondent's land as being required for the "extension of the lines of roads at present laid down as means of communication in the settlement." A proviso directed that no appropriation "for roads other than those already defined" shall be sanctioned or held lawful:—

Held, that, on the true construction of the regulation, "extension" is not restricted to the enlargement of an existing road by adding to its length or breadth, but includes new lateral branches therefrom; and that the roads "already defined" are the roads mentioned in the whole of the preceding part of the regulation including the extensions.

APPEAL from a decree of the Supreme Court (Dec. 14, 1898) which dismissed the appellants' suit.

The suit was brought to enforce the appellants' claim to acquire a portion of the respondent's property for the purpose of making a road, and was dismissed because the regulation on which it was founded, and which is sufficiently set out in

* *Present:* LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

the judgment of their Lordships, was held by the Supreme Court not to apply.

Cohen, Q.C., and *Mayne*, for the appellants, contended that the Chief Justice was wrong in holding that the true construction of the first part of the regulation was that it related to the extension of lines of roads laid down in 1869, and to no others. The first part of the regulation must be read with the next succeeding portion, by which the council is directed at the beginning of each year to examine the map and determine what new lines of road are necessary, and with the provision that any land subsequently rented "shall only be rented on the terms of the renter surrendering to the public use the land required for such roads." The Chief Justice regarded these later words as inconsistent with his construction of the preceding words, but considered that no effect could be given to them so far as they enlarged the words immediately preceding. It was contended that such a construction should be given to the regulation as would give effect to both clauses. Then, as regards the meaning of the word "extension," it cannot be limited to the widening or lengthening of existing roads. It includes further or additional roads. The restricted meaning assigned by the Chief Justice would defeat the obvious purpose of the regulation. They referred to *Ince* v. *Thorburn* (1), from the same Court, decided under the Land and Municipal Regulations of 1854.

Neville, Q.C., and *T. L. Wilkinson*, for the respondent, contended that the proposed line of road for which the respondent's land was required had not been laid down in 1869, and was not an extension of any road in existence in 1869. Regulation VI. of 1869 on its true construction relates exclusively to the extension of roads laid down in that year. Thereunder the respondent was only liable to surrender to the public use so much of his land as was required for roads which the appellants had determined to be necessary in the way prescribed by the regulation. That is, they must, at the beginning of some year previous to the respondent or his predecessor

(1) (1886) 11 App. Cas. 185.

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having first rented it from its native owner, have examined the map mentioned in the regulation and determined that it was necessary to take the land. There was no evidence that the appellants had done so prior to 1898. The Chief Justice was right in his construction of the word "extension," and in any event the respondent was not bound to surrender his land without compensation.

Cohen, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE. The appellants commenced the present suit for the purpose of enforcing their right to take a portion of the respondent's land for a public road. The land in question was rented or acquired by a Mr. Bollard from the native owner on October 28, 1896, and it was subsequently transferred to the respondent. He maintains, first, that the regulations in force do not empower the appellants to take his land against his will; and, secondly, that they have not performed the conditions required for putting the regulations in force against him.

The regulations were made in the year 1869, and they have the force of law in Shanghai. Regulation VI., so far as it affects the present case, runs as follows:—

"It is understood and agreed that land heretofore surrendered by the various foreign renters to public use, such as roads and the beach grounds of the rivers within the aforesaid limits, shall remain henceforth dedicated to the same uses, and as new lots are acquired, such parts thereof as are beach ground shall be held under and subject to similar uses, and due provision shall be made for the extension of the lines of roads at present laid down as means of communication in the settlement. To this end the council appointed by the land renters and others entitled to vote on the terms and in the manner hereinafter mentioned within the boundaries referred to, will at the beginning of each year examine the map and determine what new lines of road are necessary, and all land subsequently rented shall only be rented on the terms of the renter surrendering to the public use the beach ground aforesaid, if any,

and the land required for such roads, and in no case shall land so surrendered, or which shall now be dedicated to the use of the public, be resumed, except with the consent of the proper majority of land renters and others who may be entitled to vote as aforesaid in the public meeting assembled, nor shall any act of ownership be exercised over the same by the renters thereof, notwithstanding any payment by them to the Chinese Government of any ground-rent. Provided always that no act of appropriation or dedication for public uses of the said beach ground, or of ground for roads other than those already defined, shall contrary to the will of the renters thereof in any case be sanctioned or held lawful under these regulations."

The cause was tried before the Chief Justice of the Supreme Court. He addressed himself to the objection that the road is not one of those to the making of which the respondent's land is made subject by the regulation, because it does not continue one of the old lines in the same direction, but branches off from it laterally. This objection appeared to the learned judge to be valid.

His reasoning is to the following effect. He holds, first, that the power given to the council to determine annually what new lines of road are necessary is limited by the words "to this end"—namely, that "due provision shall be made for the extension of the lines of roads at present laid down"; secondly, that the word "extension" can only mean enlargement of an existing road by adding to its length or its breadth; thirdly, that the words in the second sentence which provide for new lines of road cannot be reconciled with those of the first, which provide for extensions; and, fourthly, that the former and narrower expression limits the later and wider one. On this ground he dismissed the suit with costs: and from that decree the council appeal.

It may well be doubted whether in point of fact this road is not an "extension," even within the narrow meaning affixed to that word by the Court below. And, again, it may well be doubted whether, even if there be a conflict of expression, the power to determine new lines of road, which is calculated to serve the object of securing sufficient communications for a

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new and growing settlement, should not rather interpret and enlarge the word "extension" than be restricted by it. But their Lordships do not enter more minutely into these considerations because they think that there is no such conflict of expression as appeared to the Court below.

The word "extension" is very commonly used in connection with railways and tramways, both in legal documents and by people at large. When an extension of the Great Western Railway is spoken of no one supposes that the thing meant is merely to prolong the existing line or to increase its breadth for laying down more rails. Branches are contemplated as well as the original main line when extensions are spoken of. That is certainly a common use of language, nor can their Lordships see that in point of etymology or philology it is incorrect.

The whole expression is, "extension of the lines of roads at present laid down as means of communication in the settlement." The words combined with extension certainly do not tend to give it less than its ordinary meaning. They point to enlarged means of traffic in the settlement, and it is only by an artificial strain upon the words that the contemplated provision can be confined to particular directions of roads existing at the date of the regulation; and a strain, it may be added, which does not promote but defeats the main object.

The unhappily expressed proviso at the end of that part of the regulation, which has been set out above, was the subject of remarks in the case of *Ince* v. *Thorburn*. (1) Lord Blackburn pointed out that if roads already defined meant roads then marked out on the map, as the respondent contends, all the preceding provisions would be nullified. It was not necessary in that case, which related to the preservation of beach lands from building, to construe the proviso with exactitude. Nor has it been necessary for the Supreme Court to construe it in this case. It must be construed now; and, ill-drawn as the regulation is, their Lordships no not, after the careful sifting which it has received during the argument, feel any serious difficulty about it. They hold that the roads "already defined"

(1) 11 App. Cas. 185.

are the roads mentioned in the whole of the preceding part of the regulation, including the extensions or authorized new roads for which express and specific provisions had been made. The proviso so read protects the renters from expropriation by any other method than that prescribed to their own elected council, and it does no more.

It remains to see whether the council has complied with the conditions necessary for lawful expropriation. That point, also, it was not necessary for the Court below to decide. The regulation requires that at the beginning of the year the council shall examine the map and determine what new lines of road are necessary. All lands subsequently rented are made subject to the demands for such roads. It appears from the evidence of Mayne, the engineer of the council, and of Godfrey, their secretary, that a plan was made in 1893, and extensions marked on it with red colour in 1894. Exhibit D is an enlarged copy of that plan. The red colour includes the respondent's land. It was approved by the council, and hung up in the board room, and copies were sent to the several consulates, and a notification was advertised. The map hung in the board room remained there. No alteration was made in it till the year 1898. The notification of January, 1898, says that the plan of 1894 holds good. On this evidence, their Lordships are of opinion that the council have taken the prescribed steps, and that they have also taken care to make their intentions known to renters, and that this was done before Bollard's acquisition of the land in 1896.

The appellants ask for the surrender of the land, and the removal of obstructions, and the costs of suit. They are entitled to that relief. Their Lordships will humbly advise Her Majesty to discharge the order appealed from, and instead thereof to make an order according to the prayer of the appellants' application to the Supreme Court. The respondent must pay the costs of this appeal.

Solicitors for appellants: *Blount, Lynch & Petrie.*
Solicitors for respondent: *Indermaur & Brown.*

[PRIVY COUNCIL.]

J. C.* 1899 Dec. 19. 1900 Feb. 17.

WENTWORTH . . . . . APPELLANT;

AND

MATHIEU . . . . . RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT OF QUEBEC.

Canada Temperance Act, 1864, s. 17—*Construction.*

There having been numerous convictions of the respondent, with accumulated penalties amounting to $1400, for having on various occasions sold intoxicating liquor, and thereby committed offences under the Canada Temperance Act of 1864, a certiorari was granted in one case by the Superior Court, on the ground that by the true construction of s. 17, which provides that two or more offences by the same party may be included in the same complaint, a penalty of $100 was sufficient for all offences under the Act during the limitation period of three months prescribed by s. 15:—

Held, that, in the absence of express words to that effect, s. 17 must be construed as permissive merely, and not imperative.

APPEAL from a judgment of the Superior Court of Quebec (May 5, 1899) which, by proceedings under a writ of certiorari, quashed a conviction under the Temperance Act of 1864, made on the complaint of the appellant against the respondent.

Between June 9 and July 20, 1898, the appellant preferred twenty-nine complaints and obtained twenty-nine convictions of the respondent, with penalties amounting to $1400.

The respondent having duly paid the fine in respect of the first case, the Superior Court granted a writ of certiorari in the second, and quashed the conviction therein with costs.

The reasons given for the judgment of the Superior Court maintaining the writ of certiorari were that all the fines united amounted to a total of $1400; that by s. 17 of the Act it was permitted to the complainant to include any number of offences in one complaint, but that the maximum penalty for them all should not exceed $100; that it was the intention of

* *Present:* LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

the legislature to inflict a reasonable punishment; that the penalty of $100 was considered a sufficient chastisement for all the offences committed up to the date of the institution of prosecution; and that a complaint laid at a certain date was under the statute presumed to include and to cover all the offences committed anterior thereto; and that therefore the magistrate, having convicted the accused in the first case, he was without jurisdiction to hear and determine any of the other complaints.

Blake, Q.C., and *R. C. Smith, Q.C.*, for the appellant, contended that the convictions were right, and ought not to have been quashed. They were in accord with the uniform practice of the Magistrates' Court for twenty years. Sect. 13 of the Act imposes a penalty for each offence. Sect. 17, relied upon by the Court below, is permissive in its terms, and does not require that all offences committed by the same party anterior to the laying of the complaint should be included therein. Sect. 36 specially forbids the issue of any writ of certiorari in such cases: see also art. 1290 of the Code of Civil Procedure.

Panneton, Q.C., and *Mayne*, for the respondent, contended that the right to a writ of certiorari always exists when there has been an excess of jurisdiction. The Magistrates' Court exceeded its jurisdiction in inflicting $1400 penalties when no more than $100 could be imposed under the statute. The object of s. 17 of the Act in limiting the amount of penalty to be imposed in the same complaint, no matter how many offences have been proved, has been nullified in this case. That provision has been evaded by presenting separate complaints in respect of each of several offences, and thereby an indefinite amount of penalties is supposed to have been legalised.

Blake, Q.C., replied.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The question in this appeal arises upon an Act of the legislature of Canada (27 & 28 Vict. c. 18), commonly called the "Temperance Act of 1864." Sect. 12 of this Act prohibits the sale of any spirituous or other intoxicating

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liquor unless it be for exclusively medicinal or sacramental purposes, or bonâ fide use in some art, trade, or manufacture. Sect. 13 is as follows: "Whoever by himself, his clerk, servant, or agent, exposes or keeps for sale, or directly or indirectly, or on any pretence, or by any device, sells or barters, or in consideration of the purchase of any other property, gives to any other person any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage and a part of which is spirituous or otherwise intoxicating in violation of the twelfth section of this Act, shall incur a penalty of not less than twenty nor more than fifty dollars for each such offence, and whoever in the employment or on the premises of another so exposes or keeps for sale, or sells, or barters or gives in violation of the said section, shall be held equally guilty with the principal and shall incur the same penalty." Sect. 17 provides that two or more offences by the same party may be included in one complaint provided the time and place of each offence are stated; but whatever may be the number of the offences included in one complaint the maximum of penalty imposable for them all shall in no case exceed $100. In June, 1898, the appellant made a complaint to the District Magistrate for the District of St. Francis in the Province of Quebec that the respondent, on or about April 23 then last past, had sold and delivered intoxicating liquors and received payment for the same contrary to this Act, whereby he had become liable to pay $50 with costs. On June 30, 1898, the respondent was convicted by the District Magistrate of having on April 23 then last sold and delivered to one George Mount intoxicating liquors contrary to the Act, and adjudged to forfeit and pay to the appellant $50, to be applied according to law, and also to pay $29.76 for costs. On July 13, 1898, the appellant made a similar complaint to the same magistrate of an offence committed by the respondent on April 19 then last past, and the respondent was on July 20, 1898, convicted of selling intoxicating liquors to one J. H. P. Armitage on April 19 contrary to the Act, and adjudged to forfeit and pay to the appellant $50, to be applied according to law, and 90 cents for costs.

In addition to these convictions, there were at different times

between June 8 and July 21, 1898, twenty-seven other convictions of the respondent on the complaints of the appellant by the same magistrate of similar offences committed on different days between March 26 and May 19, the penalty in each case being $50. On September 15, 1898, the Superior Court of Lower Canada on the petition of the respondent ordered a writ of certiorari to issue, and on April 5, 1899, the writ was issued in the case of the second of the convictions before mentioned, namely, for the sale on April 19 to Armitage, being No. 526 in the records of the Magistrates' Court. A return having been made to the certiorari, the Superior Court on May 5, 1899, pronounced its judgment annulling the conviction, and on July 14, 1899, Her Majesty by an Order in Council gave the appellant special leave to appeal against this judgment upon the appellant submitting to pay the costs of this appeal incurred by the parties on both sides in any event if it should appear advisable to the Judicial Committee so to direct when the appeal came on for determination, and also to abide by any recommendation which their Lordships might see fit to make as to the enforcement of penalties by the appellant against the respondent. The judgment of the Superior Court delivered by Lemieux J. appears from his reasons for it which are in the record to be founded on the opinion that according to s. 15 the legislature thought that the penalty of $100 was sufficient punishment for all the breaches of the law up to the time of the prosecution and during the three months previous to it, that being the limitation of time from the committing the offence for the prosecution for it, and that the complaint of June 9 covered and included all offences previous to that date; that as one or more offences of the same nature against the Act could be included in the same prosecution, a complaint made at a particular date for a single offence is presumed to be made and to comprehend all the offences against the Act up to the date of the complaint. Their Lordships are quite unable to agree with the Superior Court in this opinion. It is an addition to s. 15 for which there is no authority either in the words of it or by implication. The purpose of s. 17 appears to be to prevent a prosecution under the Act where only one

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offence is charged failing by reason of the evidence not being sufficient to prove it, or in consequence of a variance in the complaint from the evidence of the time when or the person to whom the intoxicating liquor was sold if more than one offence has been committed, and the limit of the penalty to $100 indirectly restrains the use of that power. There is no reason for thinking that "may" is to be imperative, and the same as "shall." There is nothing which shews it is intended to have other than its natural meaning. If, as the Superior Court was of opinion, the legislature thought a penalty of $100 was sufficient punishment for all offences committed within three months previous to the complaint, their Lordships do not doubt but that it would have said so and provided for it. The learned judge supported his opinion by references to Russell on Crimes and the American and English Encyclopædia of Laws, in which the principle is laid down that "where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea of autrefois acquit is generally good." The meaning of this is that where the same facts would justify a conviction for two different offences (say, burglary and petty larceny), a man who has been convicted for one offence cannot be tried over again on the same facts for the second offence. This principle has no application to the present case. Evidence that the defendant supplied liquor to B. at a given hour and place would not support a complaint that he supplied liquor to A. at another hour or place, notwithstanding that both complaints might have been included in one proceeding. Their Lordships are not aware of any general principle in criminal law which would support the view of the Superior Court. The magistrate has a discretion as to the amount of the penalty between $20 and $50, and where, as in the present case, there are many complaints by the same person of separate offences, it would be right to exercise it. They are therefore of opinion that the conviction of the respondent should not have been quashed, and will humbly advise Her Majesty to reverse the judgment of the Superior Court.

Their Lordships note with satisfaction the statement of the

learned counsel for the appellant that the penalties on the conviction of the respondent will not be enforced, but they do not think it necessary to include a recommendation to that effect in the report which they will make to Her Majesty. In pursuance of the undertaking of the appellant on the leave to appeal, their Lordships direct the appellant to pay the respondent's costs of this appeal to be taxed as between solicitor and client.

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Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondent: *Stibbard, Gibson & Co.*

[PRIVY COUNCIL.]

COATES . . . . . APPELLANT;

AND

THE QUEEN . . . . . RESPONDENT.

J. C.* 1900 *Jan.* 31; *Feb.* 17.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand Railways Construction and Land Act, 1881, *ss.* 123, 125, 126—*Effect of an Order in Council retaining a Railway as Government Property—Rights of Debenture-holders.*

Under New Zealand Railways Construction and Land Act, 1881, ss. 125 and 126, the Governor of the Colony, having taken possession of a railway under s. 123, is empowered on the happening of events in the later section specified to declare his intention to retain the railway as Government property:—

Held, that on publishing an Order in Council giving effect to such intention, his title to the railway is absolute and paramount, and that the rights of debenture-holders whose debentures were authorized by a later Act in 1884 to be a first charge on the railway fall with the company's title.

APPEAL from a judgment of the above Court (May 25, 1899) affirming an order of the Supreme Court of New Zealand (Feb. 4, 1899) varying an order of Edwards J. (July 4, 1898).

The appellant is receiver for the debenture-holders of the

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New Zealand Midland Railway Company, Limited. The question was whether the debenture-holders, under the circumstances stated in the judgment of their Lordships, were entitled to an order for the sale of so much of the railway as had been actually completed, notwithstanding that the company had failed to carry out its contract for the completion of the line, and that the Governor of the Colony had, in exercise of the powers in that behalf conferred on him by the statutes referred to in the judgment, taken possession of and assumed the management of the railway, and was proceeding to complete the same; or, in other words, whether the charge of the debenture-holders takes priority over, or is subject to, the rights of the Crown in relation to the said railway.

By the order of Edwards J. it was directed that the property in New Zealand of the said company, including the railway line and rolling stock, should be absolutely sold, but so that the sale should not be proceeded with or take place without further orders, of the application for which due notice should be given to the Crown Solicitor, and the appellant was appointed receiver.

The Supreme Court declared that the Crown was entitled to retain possession of the railway as defined by s. 2 of the Railways Construction and Land Act of 1881 in priority to the appellant, and ordered that the appointment of the appellant as receiver should be limited to the rents, income, and profits of the property of the company not forming part of the railway so defined, and that the order for sale should be similarly limited.

The Court of Appeal affirmed this order, holding that the right of the Crown to take possession of the railway was in no sense a charge; that the debenture-holders must be taken to have lent their money with notice of the provisions of the Act of 1881, and that there was nothing in the special Act of 1884 relating to this railway to modify in their favour the provisions of the Act of 1881.

Swinfen Eady, Q.C., and *A. R. Kirby*, for the appellant, contended that possession of the railway should be given to

the receiver, and that the sale directed by the order of July 4, 1898, should be carried out. They contended that, so far as regards the railway in question, the general Act of 1881 and the special Act of 1884 above mentioned should be read together, the former being subject to and controlled by the latter. The power to take possession under s. 123 of the former Act must, so far as regards the railway in question and under the circumstances of the case, be a power to take possession of and under s. 125 retain the railway subject to the charge created by the debentures specially authorized by the later Act and by the deed which secured the same. Under s. 126 of the former Act on its true construction the railway would only be vested in the respondent subject to that charge. The railway was vested in the receiver on his appointment, and his right as representing the debenture-holders was paramount to the rights of the Crown. The Government was bound by the terms of the later Act which authorized the raising of money for expenditure on the railway by the issue of debentures on the terms that they were to constitute a first charge on the assets of the company including the railway; which charge was to be enforced by the appointment of a receiver by the Court. Accordingly, it is inequitable and contrary to the intention of the Act that the Crown should take the railway created by the expenditure and repudiate the charge.

Haldane, *Q.C.*, *Bell*, and *Northcote*, for the respondent, contended that the statutory right reserved to the Crown by the Acts of 1881 and 1884 to take possession of the railway and complete the same in the events specified in s. 123 of the former Act has precedence over the charge given to the debenture-holders. They took their security with plain notice of the rights of the Crown under the Acts and the contract. The title of the debenture-holders being derived from the company, they cannot have any better title against the Crown than the company in the absence of special provision to that effect in the Acts and contract. When the Government gave its notice under s. 125, it did not obtain a charge which could compete with that of the debenture-holders. It determined the title of the company which was conferred by statutory power, and

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abolished thereby all subordinate or derivative titles falling therewith. With regard to its being inequitable that the Crown should repudiate the charge created by the debentures, grants of Crown land were made to the company to assist the construction of an entire line of railway. It is in that view inequitable and contrary to the public interest that the Colony should be deprived of the benefit of an entire line of railway, to secure which such grants were made.

Swinfen Eady, Q.C., replied.

1900 *Feb.* 17.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The controversy between the parties to this appeal turns upon the true construction of two statutes of the Legislature of New Zealand—"The Railways Construction and Land Act, 1881," and "The East and West Coast (Middle Island) and Nelson Railway and Railways Construction Act, 1884." The question in substance is whether the right of the Crown under the Act of 1881 to retain possession of the railway which the New Zealand Midland Railway Company, Limited, began to construct, but were unable to finish, is or is not subject to a charge in favour of the holders of debentures issued by the company.

The company was formed in England under the Companies Act, 1862, for the purpose of constructing and working the railway. Its nominal capital was 500,000*l.*, but it had unlimited borrowing powers. The contract for the construction of the railway, which was subject to the provisions of the Acts of 1881 and 1884, was made under the authority of the Midland Railway Contract Act, 1887, between Her Majesty the Queen, represented by the Governor of the one part and the company of the other. The railway was to be completed within ten years from January 17, 1885. The proposed line was about 235 miles in length. It was intended to connect the east and west coasts of the Middle Island, and at each extremity to form a junction with Government railways then in operation. The total estimated cost was 2,500,000*l.* In aid of the enterprise, Her Majesty agreed to deliver to the company possession of all lands then in the possession and at

the disposal of the Crown required for the purposes of the undertaking, and also to grant to the company out of the public domain as the works proceeded and successive sections of the line were completed lands of the value of 50 per cent. of the total estimated cost of construction.

The company raised 745,000*l.* by the issue of debentures and began the work of construction. In 1894 about seventy-five miles of the railway were completed. The cost of the work actually completed was, according to the estimate in the contract, 470,000*l.*, and the company received from the Crown grants of public land to the extent of 50 per cent. of that sum. Early in the year 1894 the operations of the company came to a standstill. The period fixed for the completion of the railway expired in January, 1895. In the following May, under the powers of the Act of 1881, s. 123, the Governor took possession of the railway and assumed the management of the part which had been completed, and went on with the construction of the line. In accordance with the provisions of that section, accounts were rendered half-yearly, shewing the amounts expended and received by the Government, and the balances due from the company. For a time the company, or the debenture-holders in the name of the company, satisfied the demands of the Government out of the proceeds of sale of their land grants. The last payment was in respect of the accounts for the period between March 1 and August 31, 1897, and was made on January 26, 1898. Since that date nothing whatever has been paid by or on behalf of the company to the Government, and there is a large sum now due.

It is not disputed that the Governor was acting within the powers conferred upon him by s. 123 of the Act of 1881 in taking possession of the railway and assuming the management thereof and proceeding with the works. Nor can it be denied that the company have failed to make good public moneys expended on the line which, by their contract and the Act of 1881, they were bound to repay. The only question is whether there is anything to prevent the Governor availing himself of the further powers conferred upon him by ss. 125 and 126 of the Act of 1881, and thereby acquiring an absolute

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title to the railway to the exclusion of the company and its debenture-holders.

Sects. 125 and 126 of the Act of 1881 are in the following terms:—

"Sect. 125. If the company for the space of one year after the Governor has taken possession . . . . shall fail to repay all sums of public money which have been expended in or towards completing the said railway and the equipment thereof, and all sums of public money which shall have been expended on the repair or management of the railway or in connection therewith in excess of the receipts therefrom, it shall be lawful for the Governor at any time after the expiration of the one year to give three months' notice to the company that he intends to retain the said railway as Government property.

"Sect. 126. On the publication of an Order in Council at any time after the expiration of the said three months to the effect that possession has been taken as aforesaid and will be permanently retained by the Government, the said railway and stations, and all plant, equipments, and appurtenances belonging thereto, shall, unless a satisfactory arrangement be in the meantime made between the Government and the company, become and be absolutely vested in Her Majesty the Queen without any conveyance or transfer whatsoever."

It seems that on May 9, 1898, after the half-yearly accounts from September 1, 1897, to February 28, 1898, had been rendered, the Governor gave notice of his intention to retain the railway as Government property. But, in order that the question which it was known the debenture-holders intended to raise might not be prejudiced, the Governor very properly abstained from issuing any Order in Council. It must, therefore, be taken for the purposes of this case that the Governor is rightfully in possession, and that the company are in default, but that no further step has been taken on behalf of the Government to exclude the company and the debenture-holders.

It appears to their Lordships that up to this point the case is perfectly clear. The company have only a determinable interest in the railway. Owing to their default, the Governor is now in a position to determine their interest. When their

interest is determined, all rights depending upon the title of the company must fall with it. The power conferred upon the Governor to declare his intention to retain the railway as Government property means nothing unless it means that the railway is to be retained as property belonging to the Governor for the use of the public, and for no other use or purpose whatever, free from all charges and incumbrances created by the defaulting company. When the Governor takes the formal step of publishing an Order in Council his title on behalf of the public will be absolute and complete. It appears, therefore, to their Lordships that, unless there be some special provision negativing this view, and giving the debenture-holders a right independent of the title of the company and superior to the right of the Governor, their claim must fail.

It was argued on behalf of the debenture-holders that such a provision is to be found expressed or implied in the Act of 1884. It therefore becomes necessary to refer to that enactment.

The Act of 1881 was a general Act. The Act of 1884, which refers to the Act of 1881 as "the principal Act," specially authorized the construction of the railway which the New Zealand Midland Railway Company was afterwards formed to construct. Some of the provisions of the Act of 1881 were repealed. Others were modified in favour of the promoters of the proposed railway. But ss. 123–126 were left untouched, and are, therefore, by s. 18 of the Act of 1884, to "have full force and effect in respect of the railway to be constructed under the authority of" that "Act and the company constructing the same."

Among the provisions of the Act of 1881 repealed by the Act of 1884 was a group of sections relating to the borrowing of money. The borrowing powers in the Act of 1884, which took their place, authorized the company "from time to time" to borrow such sum or sums of money as might be necessary for completing the construction of the railway, and for that purpose to issue debentures. And the enactment goes on to declare that all such debentures, and the interest payable thereon, shall be "a first charge on the entire assets of the company, including the railway and everything pertaining thereto."

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Some reliance was placed on the words "from time to time," which do not seem to have much bearing on the question. But the main argument was rested on the declaration that the debentures should be a first charge on the railway. It was contended that those words made the claim of the debenture-holders paramount to the rights of the Government. But the answer is that the right of the Government under ss. 125 and 126 of the Act of 1881 is not a charge on the railway and does not interfere with the priority of the charge in favour of the debenture-holders over other creditors of the company. The right of the Government is the right, in case of default on the part of the company, to take possession of the railway and retain it as Government property.

An argument on the part of the debenture-holders was founded on the provisions of the Act of 1884 authorizing debenture-holders, in case of default in payment of principal or interest, to apply to the Court for the sale of such part of the company's property as was liable under the provisions of the Act for the payment of the money, and, in the meantime, for the appointment of a receiver. Those provisions, however, are evidently intended to apply as between the company and its creditors, and do not interfere or purport to interfere with the paramount rights of the Government. It is not necessary to consider whether under any circumstances it would be competent for the debenture-holders to enforce the sale of part of the line and so break up and disintegrate the railway. But their Lordships, as at present advised, see no reason to differ from the conclusion of the Supreme Court sitting in banco, which is adverse to any such contention.

It was under these latter provisions of the Act of 1884 that the proceedings were taken which have given rise to this appeal. The debenture-holders applied for a sale of the completed portion of the railway and the other property of the company on which their debentures were charged. An order was made by arrangement and without argument in accordance with the prayer of the petition. On appeal to the Supreme Court that order was restricted so as to exclude any property being or forming part of the railway as defined by the Act of

1881, and any property forming part of or attached to the railway or used in connection therewith as appurtenant to the same. The order of the Supreme Court was affirmed on appeal.

Their Lordships are of opinion that the view of the learned judges of the Supreme Court and the Court of Appeal was perfectly correct, and they will therefore humbly advise Her Majesty that this appeal ought to be dismissed.

The appellant will pay the costs of this appeal.

Solicitors for appellant: *Slaughter & May.*

Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

J. C. 1899 Nov. 23. 1900 Feb. 17.

TAYLOR AND ANOTHER . . . . . PLAINTIFFS;

AND

B. STURROCK AND OTHERS . . . . . DEFENDANTS.

W. STURROCK . . . . . PLAINTIFF;

AND

B. STURROCK AND ANOTHER . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Natal Law No. 22 of 1863, *s.* 7—*Contract by Spouses to bring themselves within the Law—Registration—Mutual Will—Construction.*

By s. 7 of Natal Law No. 22 of 1863, passed to prevent community of goods attaching to certain marriages, persons married in South Africa can bring themselves under its provisions by a registered written instrument to that effect:—

Held, that, by the true construction of that section, if the instrument is unregistered it is inoperative for all purposes and as between the parties.

Where husband and wife, not within Law No. 22, by mutual will directed their executors to sell the testator's estate as soon as convenient

* *Present:* LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

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after the testator's death without specifying a date for payment of legacies directed by the testator, and so soon after the death of the testatrix as may be to pay the legacies directed by her :—

Held, that by the true construction of the will the testator's legacies were payable at his death. The intention to dispose of everything was apparent, and the words did not necessitate the suspension of payment of testator's legacies with consequent intestacy as to the resulting income.

APPEALS from two decrees of the Supreme Court (Nov. 17, 1897).

The decree in the first case declared that under the circumstances stated in the judgment of their Lordships community of property had existed between John Thompson Sturrock, deceased, and the respondent, Bertha Sturrock, at the date of the death of the former, and consequently that the appellants were not entitled to relief prayed on the footing that community did not exist. The decree in the second case declared that the respondent William Sturrock was entitled to be paid a legacy of 500*l.* bequeathed to him by the mutual will of the said spouses as soon as the estate of the deceased could conveniently be realized, and that the payment of such legacy was not by such will postponed till the death of the widow.

The main question decided in the appeals was whether the said husband and wife, who were married in South Africa, and, therefore, by the Roman-Dutch law in force in Natal, in community of estate, had effectually brought themselves within the provisions of Law No. 22 by a post-nuptial contract to that effect executed in 1892, but not registered.

The Court below decided this issue in the negative, and further refused to hold that the Natal law allows an unregistered post-nuptial contract to be binding between the parties to it though not against creditors. As to the question whether William Sturrock was entitled to have his legacy paid forthwith, the last clause of the mutual will which is set out in their Lordships' judgment was very clumsily drawn, but would admit of the interpretation contended for on either side. Looking at the whole will, the Court was of opinion that the testator's intention was that as soon as he died the estate should be realized and payment of the specific legacies made.

Swinfen Eady, *Q.C.*, and *Israel Davis*, for the appellants, contended that community of property between John Thompson Sturrock and Bertha Sturrock had been effectually dissolved by the post-nuptial contract on August 14, 1892, which had been executed with that view. The contract was a valid one, and might have been concluded without the aid of Law No. 22 of 1863, as amended by Law No. 17 of 1871 and Law No. 14 of 1882. Those laws expressly save all rights which might validly have been created irrespectively of their provisions. But assuming that this contract was executed thereunder, by the true construction of those laws the contracts therein contemplated are not avoided against the parties thereto, though they are not made binding against creditors, unless registered. With regard to cases in the colony as to the effect of registration, the leading case is *Steytler* v. *Dekkers*. (1) Reference was also made to *Gowan* v. *Wright* (2) and *Davenport* v. *Reg.* (3) to shew that without registration the contract holds good as between the parties. It had been acted upon; the parties thereto have put it out of their power to rescind it or any instruments of transfer to which it gave occasion or cause, unless by mutual consent and one of them is dead. The penalty for non-registration is simply that a registered deed takes precedence. The Natal statutes at the period of those laws were not carefully drawn, and require a benevolent construction: see Maxwell on Interpretation of Statutes, 3rd ed. p. 290. The mutual will of the spouses, if there was no community of property, was in law two separate wills, and the dispositions thereunder were consistent with and subject to the notarial bond given by the husband to his wife's trustees in respect of the value of a moiety of the common estate and of even date with the unregistered contract. Even if they were not separate wills, by the true construction of the instrument regarded as a mutual will the legacies bequeathed by the husband are payable after and not before the death of the widow.

Eve, *Q.C.*, and *H. B. Howard*, for the respondents, Annie Cuthbert (an executrix of the husband) and William Sturrock,

(1) (1871) 2 Roscoe, Cape of Good Hope Reports, 98.

(2) (1886) 18 Q. B. D. 201.

(3) (1877) 3 App. Cas. 115.

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who were only heard on the point of registration, contended that the notarial bond and the post-nuptial contract were parts of one and the same transaction, and that the latter was void for want of registration, and consequently the bond was void also. Want of registration rendered the bond void for all purposes. By s. 7 of Law No. 22 of 1863 the post-nuptial contract in question "shall not be binding if not registered in the Registrar of Deeds Office within six months after execution." The plain meaning of this section is that the instrument is not binding between the parties as well as regards third persons. Reference was made to *Denyssen* v. *Mostert* (1), shewing that no contract between husband and wife is binding unless authorized by statute, and this statute only authorizes a registered contract.

Davis replied.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE. John Thompson Sturrock and Bertha his wife were married in the year 1875 at Lydenburg, in the South African Republic. For nearly twenty years before J. T. Sturrock's death, which took place in the year 1896, they resided at different places in the Colony of Natal. It is not disputed that the law attaching to them at the time of their marriage was the ordinary Roman-Dutch law of community of goods, or that they remained under that law unless they altered their status by certain transactions which took place in the year 1892.

Law No. 22 of 1863 was passed for the purpose of preventing community of goods attaching to certain marriages, and of enabling married persons to make other arrangements. Sect. 2 says:—

"Community of goods or any of the liabilities or privileges resulting therefrom shall not attach to or exist between or be deemed to have attached to or existed between any spouses who have been or shall be married elsewhere than in South Africa unless such spouses shall by an instrument in writing signed by each of them in the presence of two persons who

(1) (1872) L. R. 4 P. C. 236, 254.

shall subscribe thereto as witnesses, express their wish to be exempt from the provisions of this law, and such instrument shall be registered with the Registrar of Deeds within six months after execution thereof, the person requiring such registry paying therefor and thereupon the fee of 1*l.* sterling."

Sect. 7 says :—

"This law shall extend to any marriage already had or to be had before or after the passing of this law in Natal or elsewhere in South Africa, if the spouses of such marriage shall by an instrument in writing . . . . express and signify their wish, desire or intention to be brought within the provisions of this law, and such instrument in writing shall be capable of being registered by the Registrar of Deeds, and upon every such registration there shall be paid by the person requiring the same to be registered a fee of 1*l.* sterling and no more, and such instrument shall not be binding if not registered in the Registrar of Deeds Office within six months after execution."

On August 14, 1892, the husband and wife executed a post-nuptial contract. It first recites :—

"Whereas the said appearers were duly married in community of property at Lydenburg in the South African Republic on the 7th day of July 1875. And whereas the said appearers do and each of them doth hereby express and signify their and his and her wish, desire and intention to be brought within the provisions of the Law No. 22 of 1863 (Natal) 'intituled' to prevent community of goods attaching to certain marriages and to enable the spouses of such marriages to devise their properties," and the Laws No. 17 of 1871 (Natal) and No. 14 of 1882 (Natal) amending said Law No. 22 of 1863.

They then went on to make other dispositions of their property. The appellants Taylor and Roy were appointed trustees for the wife.

On the same day the husband executed a bond by which he declared himself debtor to Taylor and Roy in their capacities as trustees of the wife, being so appointed by the post-nuptial contract of the same day. The debt declared was 6223*l.* 10*s.* sterling, arising from and being the amount due and payable to them in their said capacity as trustees of the said Bertha

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Sturrock, being her portion, a moiety of the estate of the debtor and his said wife under their marriage in community of goods, which said joint estate was declared by the debtor to be at this present date of the value of 12,447*l.* sterling. The bond was made payable five years after date.

For reasons set out in the record, but not material to state, the post-nuptial contract was never registered. After the death of the husband the trustees brought an action on the bond against his executors; and the question whether his estate was liable was the question in the first of the two suits in which this appeal is presented. The Chief Judge in Equity decided that the contract was void for lack of registration, and that the bond must share its fate. From that decision the trustees appeal.

For the appeal reliance has been placed on the judgments of Lord Esher and Bowen L.J. in the case of *Gowan* v. *Wright*. (1) They were construing the enactment that a judge's order for judgment made by consent of the defendant in a personal action should be filed in the way prescribed, and otherwise should be void. This they held to mean void as against creditors, not as against the parties to the order. And they refer to analogous cases in which the Courts have held that the object of the enactment under their consideration was to protect creditors, or other persons not parties to the transaction under consideration, and have therefore restricted to that object the nullity of the transaction which the enactment declares in unqualified terms. A similar restriction is contended for in this appeal.

It is observable that in s. 6 of the law now under examination, a section which relates to earnings, creditors are expressly protected, shewing that the framers of the law had clearly in their minds the distinction between creditors and others. But their Lordships will not rest their decision on this narrow ground, thinking that there is a much broader ground of distinction between this law and the other enactments on which the appellants rely with regard to the general purposes at which they aim.

(1) 18 Q. B. D. 201.

The object of this Natal law is to range whole classes of people under general laws of property differing in kind; and it may well have been considered important, not only for creditors, but for the parties themselves and for their successors, to place it beyond doubt, so that all might know, under which law any given married couple was living. That object would be best secured by requiring registration in a public office, and providing that unless an individual choice of law is registered it shall not take place.

A comparison of the two converse or complementary sections, 2 and 7, makes the point very clear. Sect. 2 deals with persons married not in South Africa, and it enacts a general law for them, namely, that community of goods shall not apply to them. But it enables individual married couples to withdraw themselves from that law, and to remain as they were before. It does so by saying that the new general law shall apply to them unless they shall by a written instrument express their wish to be exempt, and such instrument shall be registered. The language of the section leaves no ground for saying that parties can remain under the law of community of goods by any other method than that of a registered deed.

Sect. 7 deals with persons married in South Africa to whom the new law does not directly apply. They may elect to bring themselves under it. The method prescribed for that object is a written instrument which shall be capable of being registered, and shall not be binding if not registered. There can be no reasonable doubt but that in each case the prescribed method is the same, and such is the result if the words used in s. 7 are construed in their obvious and literal sense.

The result is that the post-nuptial settlement executed by the Sturrocks is not binding on anybody; that no trust was created for the wife, and that Taylor and Roy never acquired the characters in which alone the bond was given to them. Their Lordships agree with the learned Chief Judge in Equity, and the appeal fails on this point.

The question raised in the second suit relates to the construction of a joint will executed by the husband and wife on July 15, 1894. The suit was instituted against the executrixes of the

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testator by William Sturrock, who under his will is one of his pecuniary legatees and a sharer in his residue. The question is whether the plaintiff is entitled to be paid at once, or not till after the death of the widow. The Chief Judge in Equity held that the gifts became payable on the testator's death. His decision applies to several other legatees.

By the structure of the will the testator is made to speak first, then the testatrix, and then the two jointly. After giving some legacies the testator divides his residuary estate among a number of persons. His wife takes no interest at all. The testatrix gives the sum of 4500*l.* to be divided among five legatees, and bequeaths her residuary estate to the testator for his life, and on his death to be divided among a number of persons. The joint direction runs as follows:—

"The testator and testatrix further will and direct that the executors hereinafter named shall so soon as convenient after the death of the testator sell and realize his estate and effects to the best advantage, and so soon after the death of the testatrix as may be, pay the specific legacies mentioned herein, and also to pay and divide the residue and remainder of her estate and effects as herein directed should she survive the testator, but in the event of the testatrix predeceasing the testator, then to pay and divide the residue and remainder as soon as convenient after the death of the testator."

The contention of the appellants is that the payment of legacies is suspended until after the widow's death, and that the income is undisposed of. It must be confessed that the draftsman of the will, labouring to be brief, has become obscure; yet their Lordships cannot feel any serious hesitation in agreeing with the Court below that the will leaves nothing undisposed of. If a pause be made after the words "to the best advantage," there is up to that point no defect in the will as regards the testator's estate. His legacies would become payable immediately by force of the original gift, which there would not be anything to qualify. Everything would be disposed of. Then the rest of the joint direction may be confined to the estate of the testatrix. It was desirable in her case to distinguish between the pecuniary legatees (the will does not

contain any specific legacy) and the residue, because she had given the testator a life interest in the residue, thereby postponing the ultimate division. But she directs what are called the specific legacies to be paid at once. That construction brings a harmonious result out of the will without any violation of its language, though the writer has failed to make two people speak clearly in one sentence.

As their Lordships agree with the Court below, the appeal fails on this point also. They will humbly advise Her Majesty to dismiss it.

The costs must follow the usual rule, and be paid by the unsuccessful appellants.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*

Solicitors for above-named respondents: *Budd, Johnsons & Jecks.*

[HOUSE OF LORDS.]

H. L. (E.) 1900 April 3.

THE OWNERS OF THE STEAMSHIP "GANNET" . . . . . } APPELLANTS;

AND

THE OWNERS OF THE STEAMSHIP "ALGOA" . . . . . } RESPONDENTS.

THE "GANNET."

Admiralty—Collision—Second Anchor Light—"At or near the Stern"—Regulations for Preventing Collisions at Sea, Art. 11.

The decision of the Court of Appeal, [1899] P. 230, reversed on the facts so far as the *Gannet* was held to be in fault; and the decision of Bucknill J. that the *Algoa* was alone in fault restored.

In this case no principle of law or construction of rules was in dispute—nothing but questions of fact. The facts are fully set out in the report below. (1) Briefly they were as follows. The respondents' steamship the *Algoa* was at anchor at night in the Elbe: she had an anchor light forward, and a second one aft at 100 or 120 feet from the stern. She was 455 feet long. Art. 11 of the Regulations for Preventing Collisions at Sea 1897 requires the aft anchor light to be "at or near the stern." The appellants' steamship the *Gannet* coming down the Elbe ran into the *Algoa*. The respondents having brought an action of collision against the appellants, those in charge of the *Gannet* said they saw the forward anchor light of the *Algoa* about a mile off, but did not see the aft anchor light till just before the collision. It was admitted that the *Algoa* had committed a breach of the regulations by reason of the aft anchor light not being "at or near the stern." One dispute of fact was whether that light could have been seen on board the *Gannet*. Bucknill J., who tried the action, being advised by the Elder Brethren that it was impossible to say that the aft anchor light might not have been entirely hidden from the

(1) [1899] P. 230.

view of those on board the *Gannet* as she approached the *Algoa*, held that the respondents had failed to prove that the breach of the rule could not possibly have contributed to the collision, and that they were alone in fault. The Court of Appeal (A. L. Smith, Vaughan Williams and Romer L.JJ.) held that the collision was caused by the fault of the appellants in not keeping a good look-out, and also by the fault of the respondents. Both parties appealed against so much of this decision as was adverse to themselves respectively.

April 2. *Joseph Walton Q.C.*, *Laing Q.C.* and *L. Batten* for the appellants.

Cohen Q.C., *Aspinall Q.C.* and *A. D. Bateson* for the respondents.

April 3. EARL OF HALSBURY L.C. My Lords, by the admission of the parties, who have had the good sense not to contest that which was incapable of being really contested, the question between the two vessels—the *Gannet* and the *Algoa*—has been narrowed to the comparatively small question whether or not the light which by the regulations ought to have been exhibited by the *Algoa* at or near the stern was in such a position that it could be seen by vessels approaching from above. That is a pure question of fact, and in view of the difference of opinion which has prevailed in the Courts below, and indeed in your Lordships' House in the advice given by the nautical assessors, I think it right to say that it does not appear to me to be a matter of nautical skill at all; indeed, if we may be supposed to understand the language and not to be misled by words the question has nothing to do with any particular technical skill on the subject. It is a question of the balance of testimony, of weighing testimony by certain known principles by which all questions of fact are weighed and considered in courts of law, and although I myself should place considerable reliance on expert opinion with respect to technical manœuvres or something which had reference to what was or was not to be done for the purpose of avoiding some impending accident by some nautical arrangement, I confess that dealing

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with mere questions of fact to be determined upon the weight and balance of evidence I will not surrender my own judgment to that of the gentlemen who are good enough to assist us with their nautical skill and experience. And I am fortified in that view by the fact that the learned judge before whom this case originally came appears to have surrendered his own view to that of his nautical assessors, and the Court of Appeal appear to have surrendered their view to that of their nautical assessors, but as a matter of fact the nautical assessors in the original Court and in the Court of Appeal were in direct conflict with each other.

My Lords, I thought it right to propound this question to the nautical assessors who were good enough to give us their assistance yesterday: "What is the view of the assessors as to the possibility or probability of the second light on the *Algoa* being seen on board the *Gannet*?" The answer was: "We think the light ought to have been seen." That seemed to me to be somewhat ambiguous, and I repeated the question, but I obtained the same answer again. I think it suggests that the light was in such a position that it ought to and but for the negligence of the look-out would have been seen by those on board the *Gannet*. I have great respect for that opinion, but I cannot surrender my own judgment on the matter. And I am the less disposed to do so because I see from the very clear judgment of Romer L.J. that he took the same view as I do, but he yielded his own view to that of the nautical assessors, who were then assisting the Court, which was in conflict with that of the other nautical assessors. It is clear that it is the duty of a judge to form his own judgment whatever that judgment may be.

My Lords, the question being, as I say, narrowed to that question which I propounded to the nautical assessors, it appears to me that the balance of testimony is greatly in favour of the *Gannet*. I shall move your Lordships therefore that the judgment be reversed and the original judgment of Bucknill J. be restored. It appears to me that it is impossible to disregard the united testimony, not only of those who were on board the *Gannet*, but of those who were on board the

Lisette, the chief mate of which had almost exactly the same experience as those on board the *Gannet*. Indeed, the *Lisette* ran aground, and according to the statement of the chief mate of the *Lisette* he never saw the second light until he was obliged to starboard his helm very suddenly, and in doing so ran aground. The *Algoa* was lying athwart the channel, and, being at anchor on a very dark night, I should have thought it was absolutely essential for those on board of her to take very good care that the lights, which, as I have said, were the only guides that could be given to vessels navigating the Elbe, should be in their proper position; and it is not, and cannot be, denied that the *Algoa* was in default in that respect. The rule compels the light to be at or near the stern, and a light at either 100 or 120 feet (for it is variously stated) from the stern certainly was not a compliance with that rule. It has been very fairly and properly admitted by those who were charged with the interests of the *Algoa* that it was not a compliance with the rule. I think one starts on the inquiry in which we have to balance testimony by remembering that the vessel which came into collision by being at anchor and swinging right across the channel is the vessel which cannot deny that she was in default in respect of her lights, and certainly when a collision arises from either not seeing a light or not keeping a good look-out for a light, that is a circumstance which every tribunal ought to weigh. Now, we start with the admission that the *Algoa* was in default in respect of lights, that is to say, the only thing that could guide a vessel in a dark night.

Then are we to disregard all the evidence by the persons who were on board the *Gannet*, and who give an account that is quite intelligible, if you suppose that the light was hidden from time to time? It may be that, owing to the gradual swinging of the vessel, the view of it might possibly have been obscured. It is also possible, as I think one of your Lordships suggested, that although it might be for a moment discernible, the lights which were upon the helm at the moment may have diverted the attention of the look-out man. But, if that was so, I do not think that that necessarily means that

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the *Gannet* was to blame, and what strikes me as all but conclusive on the subject is this: that there is not the smallest evidence of any confusion or any absence of care by those on board the *Gannet*. Apart from this question, everybody gives evidence of the care with which the *Gannet* was being navigated. She was following the *Lisette*, overtaking the *Lisette*, and from time to time orders are given to slacken the engines, I suppose, in order not to come into collision with the *Lisette*; everybody's attention was alive, and both on board the *Gannet* and on board the *Lisette* there is a concurrence of testimony that they did not see the second light. I am bound to say that the learned counsel boldly marched up to the difficulty, and, when he is encountered with the fact that if they saw the first light and if they did not see the second light it must have been because the second light was hidden, the two lights being on the same vessel, he boldly meets that difficulty by inviting your Lordships to disbelieve the evidence that they saw the first light at all. That is the only logical mode of dealing with it; but are your Lordships prepared to accept that? It seems to me that that is a very bold statement that you are to disbelieve all these people—not only the people who saw, but the man who called out and the man who received the notice—all those people must of course be wilfully stating what is untrue. My Lords, I think it is a canon, which any one who is familiar with courts of justice will recognise as a just one, that instead of assuming that people are perjuring themselves you should, if there is a view by which you can reconcile all the testimony, prefer that to the view which places people in the position of contradicting each other so that they must necessarily be swearing what is false.

Now, my Lords, those on board the *Algoa* would not and could not have had an opportunity of knowing whether or not the light could have been seen on board the *Gannet*, and what seems to me to be of cardinal importance—the other vessel which the *Gannet* was following and the *Gannet* herself both gave the same account that they saw one light and did not see the other. When you put together two bodies of testimony of that sort and couple it with the fact that undoubtedly that

light was in an unusual position and one in which it ought not to have been, and that it is a light that ought to have been seen, it appears to me that there is an overwhelming body of evidence in favour of the view of the *Gannet*.

But, my Lords, it seems to me that though that is the view that I should entertain upon that point, that is an understatement of the case, because it lies upon those who are admittedly in default in respect of the light to make out beyond all doubt —and I think they have not made it out at all—that the light was in such a position that it must have been seen. Looking at that, as I say, and looking at all the facts in their combination, it appears to me beyond all doubt that they have not satisfied the burden that was upon them, and therefore they must fail.

My Lords, the point as to having seen the witnesses and having had an opportunity of judging whether they were speaking the truth or not is generally a very powerful one. I am not quite certain that either side can rely upon that proposition here, because while on the one hand I am bound to admit that the learned judge who in the court of first instance heard and saw the witnesses indicates rather a tendency to act upon their testimony, he did in fact not act upon their testimony, but gave judgment in favour of the *Gannet*. That he should have yielded in this respect to the views of the nautical assessors is not absolutely satisfactory to my mind. I am sure he could not have had a very strong opinion either way, and he says so himself, and therefore I cannot regard it as a case in which I am to be overwhelmed by the opinion of the learned judge who heard and saw the witnesses.

My Lords, in the result, while I go further probably than is necessary in this case, because it appears to me that the reasonable conclusion at which one would arrive here, apart from the question on whom is the onus, is that the vessel which was athwart the stream having her lights in an unusual position, in an admittedly improper position, is the vessel that is to blame, at any rate it is enough for this purpose to say that it was for the *Algoa* to make out the proposition which I think she has failed to make out. For that reason I move your Lordships

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that this judgment be reversed, and that the respondents do pay to the appellants the costs both here and below.

LORDS MACNAGHTEN, MORRIS, DAVEY, BRAMPTON, and ROBERTSON concurred.

Order appealed from reversed so far as it held the Gannet to be in fault; decree of Bucknill J. restored with costs here and below. Cross-appeal dismissed; cause remitted to the Admiralty Division.

Lords' Journals, April 3, 1900.

Solicitors: *W. Batham; Pritchard & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

[HOUSE OF LORDS.]

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GLUCKSTEIN . . . . . APPELLANT;

AND

BARNES (OFFICIAL RECEIVER AND OFFICIAL LIQUIDATOR OF OLYMPIA, LIMITED) . } RESPONDENT.

Company—Promoters—Secret Profit by Promoters—Duty of Disclosure.

A syndicate was formed to raise a fund, buy a property and resell it to a company or some other purchaser; the fund to be in the names of trustees who were to promote and register a company to which they should resell the property, and who if a company should be formed were to be directors. The trustees bought up some of the charges upon the property for sums below the amount which the charges afterwards realized, and thereby made a profit for the syndicate of 20,000*l.* They bought the property for 140,000*l.*, formed a limited company and resold the property for 180,000*l.* to the company, of which they were the first and at that time the only directors. They issued a prospectus inviting applications for shares and disclosing the two prices of 140,000*l.* and 180,000*l.* but not the profit of 20,000*l.* That some profit had been made by buying up the charges might have been discovered by a close examination of a contract

which was referred to in the company's memorandum and articles of association and in the prospectus. Shares were issued and the company afterwards went into liquidation:—

Held, that the trustees ought to have disclosed to the company the profit of 20,000*l.*; that they had not disclosed it; that the fact that the company could not now rescind was no bar to relief; and that the appellant as one of the trustees was bound to replace that portion of the 20,000*l.* which had been paid to the trustees as their share.

The decision of the Court of Appeal, *In re Olympia, Limited*, [1898] 2 Ch. 153, affirmed.

IN 1893 the National Agricultural Hall Company, Limited, owning the place of entertainment called Olympia, was being wound up. A syndicate was formed to buy and resell Olympia. The facts and documents by which this scheme was carried out are fully set forth in the report below. (1) Briefly they were as follows. By an agreement of January 19, 1893, between the secretary to the syndicate and the appellant, reciting that the syndicate proposed to purchase Olympia with a view to the resale either to a company to be registered under the Companies Acts or to some other purchaser, it was stated (inter alia) that a fund was to be raised, and that if the company was formed the appellant and three other persons named Lyons, Hart and Hartley, who were members of the syndicate, had consented to become directors of the proposed company, and that those four persons should be trustees for the syndicate, with powers to buy and resell Olympia, to promote and register the intended company and to purchase (as an interim investment) any first mortgage bonds of the company then in liquidation. Several persons subscribed for various sums and a fund was raised. The four syndicate trustees bought up some of the debenture bonds at a discount, and also a mortgage for 10,000*l.* at the price of 500*l.* They afterwards bought in February the property called Olympia for 140,000*l.* by auction before the chief clerk.

By an agreement of March 20, 1893, between the syndicate trustees (called the vendors) and one Close, a trustee for the intended company, it was agreed (inter alia) that the company should buy Olympia for 180,000*l.* Clause 7 contained the

(1) [1898] 2 Ch. 153–160.

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following paragraph: The validity of this agreement shall not be impeached on the ground that the vendors parties hereto as promoters or otherwise stand in a fiduciary relation to the company, nor shall the vendors parties hereto be required to account for any profit made or to be made by them by the purchase of any debentures or of any other charge upon any of the property of the National Agricultural Hall Company, Limited, which are to be satisfied wholly or in part out of the fund paid or to be paid into court.

On the same day the company was registered as Olympia, Limited. The memorandum of association stated its objects, one of which was to carry out the above agreement with Close, and the articles of association provided that that agreement should be binding and carried into effect by the directors. Clause 7 was not specifically referred to. Soon after a prospectus inviting applications for debentures and shares was issued stating (inter alia) that "the promoters of the company hereinafter called the vendors who constitute the entire board of the company" (namely, the appellant, Lyons, Hart and Hartley) had bought the property for 140,000*l.* and would be the vendors to the company for 180,000*l.* The only reference to their dealings with the debentures and mortgage of the old company was as follows: "Any other profits made by the syndicate from interim investments are excluded from the sale to the company." The prospectus referred to the agreement with Close but not to clause 7.

As a matter of fact in addition to the 40,000*l.* profit which the prospectus stated, the syndicate realized more than 20,000*l.* profit, being the difference between the sum they gave for the debentures and mortgage and the sum they received, as holders of the charges, from the liquidator of the National Agricultural Hall Company. Of this profit the appellant, Lyons, Hart and Hartley received 6341*l.* Debentures and shares were issued, and in 1897, Olympia Limited having gone into liquidation, the respondent took out a summons against the appellant under s. 10 of the Companies (Winding-up) Act 1890. The summons was dismissed by Wright J., but the Court of Appeal (Lindley, Rigby and Collins L.JJ.) reversed his decision and

ordered the appellant to pay 6341*l.* with interest to the official receiver. (1)

1899. Nov. 30; Dec. 1, 4, 5. *Swinfen Eady Q.C.* and *Muir Mackenzie* (*Cassel* with them) for the appellant. There was no evidence of fraud in the sale, and at the time when the mortgage securities were purchased the appellant was not a promoter or otherwise in a fiduciary position to the company. The purchase of the charges was a separate and collateral transaction, and the trustees were not bound to disclose it. If they were under such a duty they discharged it, as sufficient disclosure was made to satisfy the statute. Even if the appellant is wrong in these contentions, the company are not entitled to recover. Their proper remedy (if any) was rescission of the contract; but as that is now not possible they can only ask for damages, and no loss having been sustained the damages are nominal. The agreement of March 20, 1893, was a special bargain and binding on the company. The company was incorporated for the express object of carrying out that agreement. The articles of association expressly provided that the appellant and his co-directors should adopt it and carry it into effect and the directors did so. The company is therefore absolutely bound by it: see ss. 11 and 16 of the Companies Act 1862. A promoter is one who in fact forms a company. At the date of the impugned transaction there was no definite purpose of forming a company; it was only one of two alternatives. To use the language of James L.J. in *Gover's Case* (2) "at the date of the contract there was no company, no promoter, trustee, or director." This appeal is governed by *Erlanger* v. *New Sombrero Phosphate Co.* (3), which was twice argued in this House: see Lord Hatherley (4); and Lord Blackburn. (5) To adopt Lord Hatherley's words the syndicate was entitled to deal with these charges "as they thought proper." Lord Cairns used similar language. See also *Ladywell Mining Co.* v. *Brookes.* (6) Secondly, there was in fact

(1) [1898] 2 Ch. 153.
(2) (1875) 1 Ch. D. 182.
(3) (1878) 3 App. Cas. 1218.
(4) 3 App. Cas. at p. 1242.
(5) 3 App. Cas. at p. 1267.
(6) (1887) 35 Ch. D. 400.

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disclosure. In the prospectus, memorandum and articles there was sufficient notice both of the existence and nature of the profit. It is true the amount was not stated; but that is not necessary. The language was perfectly clear, and the words "interim investments" must have been understood by shareholders. There is at all events no evidence that any one was misled into taking shares who would have been deterred if he had known the precise facts. Further, assume the disclosure to have been insufficient, rescission is out of the question, the company cannot repudiate, damages are the only remedy, and the Court will not award damages without evidence of loss. On this point see *Bentinck* v. *Fenn* (1), which affirmed the decision of the Court of Appeal (2) and of Pearson J. (3) It is there distinctly laid down by Lord Herschell that if a person in a fiduciary position omits to disclose a profit, but no more than a fair price has been given by the company, rescission or nominal damages are all that can be claimed.

[They also referred to *Emma Silver Mining Co.* v. *Lewis* (4) and *Peel's Case.* (5)]

A. T. Lawrence Q.C. and *A. R. Kirby* for the respondent. At the date of the purchase of the debentures the appellant and the three gentlemen who acted with him were joint promoters and at the date of receipt of the 6341*l.* were also directors. There was one scheme throughout to which every step taken was subsidiary; there was in reality no such alternative as has been suggested. From the beginning the purpose was to form the company and the appellant was in a fiduciary relation to the shareholders. This being so the syndicate was under a joint and several liability under the summons: *Flitcroft's Case* (6); and all the authorities which in such cases have enforced such liability are applicable. The disclosure of the profit of 40,000*l.* was misleading. The net profit was 60,000*l.*; and mere disclosure by reference will not satisfy statutory requirements. It is too late in the day to contend

(1) (1887) 12 App. Cas. 652.
(2) (1885) 29 Ch. D. 795 (sub nom. *In re Cape Breton Co.*).
(3) (1884) 26 Ch. D. 221.
(4) (1879) 4 C. P. D. 396.
(5) (1867) L. R. 2 Ch. 674.
(6) (1882) 21 Ch. D. 519.

that a man only becomes a promoter on the eve of registration of the company; he becomes so on the first step taken towards that end. The appellant and his associates were bound by the representation made by their prospectus that they were only making a profit of 40,000*l.* less expenses, and that statement they must make good.

Swinfen Eady Q.C. in reply.

The House took time for consideration.

April 5. EARL OF HALSBURY L.C. My Lords, in this case the simple question is whether four persons, of whom the appellant is one, can be permitted to retain the sums which they have obtained from the company of which they were directors by the fraudulent pretence that they had paid 20,000*l.* more than in truth they had paid for property which they, as a syndicate, had bought by subscription among themselves, and then sold to themselves as directors of the company. If this is an accurate account of what has been done by these four persons, of course so gross a transaction cannot be permitted to stand. That that is the real nature of it I now proceed to shew.

In the year 1892 the freehold grounds and buildings known as "Olympia" were the property of a company which in that year was being wound up. That company had issued debentures to the extent of 100,000*l.* as a first charge and a mortgage as a second charge for 10,000*l.* The four persons in question knew that the property would have to be sold, and they combined to buy it in order that they might resell it to a company to be formed by themselves. The combination, which called itself the Freehold Syndicate, but which, perhaps, the common law would have described by a less high-sounding title, proceeded to buy up so far as they could the incumbrances on the property called "Olympia." They expended 27,000*l.* in buying debentures. These, of course, were very much depreciated in value, and they gave 500*l.* for the mortgage of 10,000*l.* As soon as this transaction had been completed they, partners in it, proceeded to form a company, and it was of course

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necessary that the company should be willing to help, and accordingly the four persons in question were made by the articles of association the first directors.

The property was sold on February 8 by the chief clerk of North J. for 140,000*l.*, and the syndicate purchased nominally for that sum, but, by reason of the arrangement to which I have referred, that sum was less by 20,734*l.* 6*s.* 1*d.* than what they appeared to give. On March 29 they completed as directors the purchase of the property for 180,000*l.*, and they as directors paid to themselves as members of the syndicate 171,000*l.* in cash and 9000*l.* in fully paid-up shares—in all 180,000*l.*

The prospectus by which money was to be obtained from the public disclosed the supposed profit which the vendors were making of 40,000*l.*, while in truth their profit was 60,734*l.* 6*s.* 1*d.*, and it is this undisclosed profit of 20,000*l.*, and the right to retain it, which is now in question.

My Lords, I am wholly unable to understand any claim that these directors, vendors, syndicate, associates, have to retain this money. I entirely agree with the Master of the Rolls that the essence of this scheme was to form a company. It was essential that this should be done, and that they should be directors of it, who would purchase. The company should have been informed of what was being done and consulted whether they would have allowed this profit. I think the Master of the Rolls is absolutely right in saying that the duty to disclose is imposed by the plainest dictates of common honesty as well as by well-settled principles of common law.

Of the facts there cannot be the least doubt; they are proved by the agreement, now that we know the subject-matter with which that agreement is intended to deal, although the agreement would not disclose what the nature of the transaction was to those who were not acquainted with the ingenious arrangements which were prepared for the entrapping the intended victim of these arrangements.

In order to protect themselves, as they supposed, they inserted in the prospectus, qualifying the statement that they had bought the property for 140,000*l.*, payable in cash, that

they did not sell to the company, and did not intend to sell, any other profits made by the syndicate from interim investments.

Then it is said there is the alternative suggested upon the agreement that the syndicate might sell to a company or to some other purchaser. In the first place, I do not believe they ever intended to sell to anybody else than a company. An individual purchaser might ask inconvenient questions, and if they or any one of them had stated as an inducement to an individual purchaser that 140,000*l.* was given for the property, when in fact 20,000*l.* less had been given, it is a great error to suppose that the law is not strong enough to reach such a statement; but as I say, I do not believe it was ever intended to get an individual purchaser, even if such an intention would have had any operation. When they did afterwards sell to a company, they took very good care there should be no one who could ask questions. They were to be sellers to themselves as buyers, and it was a necessary provision to the plan that they were to be both sellers and buyers, and as buyers to get the money to pay for the purchase from the pockets of deluded shareholders.

My Lords, I decline to discuss the question of disclosure to the company. It is too absurd to suggest that a disclosure to the parties to this transaction is a disclosure to the company of which these directors were the proper guardians and trustees. They were there by the terms of the agreement to do the work of the syndicate, that is to say, to cheat the shareholders; and this, forsooth, is to be treated as a disclosure to the company, when they were really there to hoodwink the shareholders, and so far from protecting them, were to obtain from them the money, the produce of their nefarious plans.

I do not discuss either the sum sued for, or why Gluckstein alone is sued. The whole sum has been obtained by a very gross fraud, and all who were parties to it are responsible to make good what they have obtained and withheld from the shareholders.

I move your Lordships that the appeal be dismissed with costs.

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LORD MACNAGHTEN. My Lords, Mr. Swinfen Eady argued this appeal with his usual ability, but the case is far too clear for argument. The learned counsel for the appellant did not, I am sure, raise the slightest doubt in the mind of any of your Lordships as to the propriety of the judgment under appeal; the only fault to be found with the learned judges of the Court of Appeal, if I may venture to criticise their judgment at all, is that they have treated the defences put forward on Mr. Gluckstein's behalf with too much ceremony. For my part, I cannot see any ingenuity or any novelty in the trick which Mr. Gluckstein and his associates practised on the persons whom they invited to take shares in Olympia, Limited. It is the old story. It has been done over and over again.

These gentlemen set about forming a company to pay them a handsome sum for taking off their hands a property which they had contracted to buy with that end in view. They bring the company into existence by means of the usual machinery. They appoint themselves sole guardians and protectors of this creature of theirs, half-fledged and just struggling into life, bound hand and foot while yet unborn by contracts tending to their private advantage, and so fashioned by its makers that it could only act by their hands and only see through their eyes. They issue a prospectus representing that they had agreed to purchase the property for a sum largely in excess of the amount which they had, in fact, to pay. On the faith of this prospectus they collect subscriptions from a confiding and credulous public. And then comes the last act. Secretly, and therefore dishonestly, they put into their own pockets the difference between the real and the pretended price. After a brief career the company is ordered to be wound up. In the course of the liquidation the trick is discovered. Mr. Gluckstein is called upon to make good a portion of the sum which he and his associates had misappropriated. Why Mr. Gluckstein alone was selected for attack I do not know any more than I know why he was only asked to pay back a fraction of the money improperly withdrawn from the coffers of the company.

However that may be, Mr. Gluckstein defends his conduct, or, rather I should say, resists the demand, on four grounds,

which have been gravely argued at the bar. In the first place, he says that he was not in a fiduciary position towards Olympia, Limited, before the company was formed. Well, for some purposes he was not. For others he was. A good deal might be said on the point. But to my mind the point is immaterial, for it is not necessary to go back beyond the formation of the company.

In the second place, he says, that if he was in a fiduciary position he did in fact make a proper disclosure. With all deference to the learned counsel for the appellant, that seems to me to be absurd. "Disclosure" is not the most appropriate word to use when a person who plays many parts announces to himself in one character what he has done and is doing in another. To talk of disclosure to the thing called the company, when as yet there were no shareholders, is a mere farce. To the intended shareholders there was no disclosure at all. On them was practised an elaborate system of deception.

The third ground of defence was that the only remedy was rescission. That defence, in the circumstances of the present case, seems to me to be as contrary to common sense as it is to authority. The point was settled more than sixty years ago by the decision in *Hichens* v. *Congreve* (1), and, so far as I know, that case has never been questioned.

The last defence of all was that, however much the shareholders may have been wronged, they have bound themselves by a special bargain, sacred under the provisions of the Companies Act, 1862, to bear their wrongs in silence. In other words, Mr. Gluckstein boldly asserts that he is entitled to use the provisions of an Act of Parliament, which are directed to a very different purpose, as a shield and shelter against the just consequences of his fraud.

My Lords, I am afraid I must call your Lordships' attention for a moment to the prospectus of Olympia, Limited. In my opinion it is the cardinal point of the case, and I do not think full justice has been done to it. The prospectus, I am sorry to find, was prepared in the office of a well-known solicitor. I wish I could say that it displays the simplicity and candour

(1) (1831) 4 Sim. 420.

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which some persons perhaps might expect from such an origin. Now this is what the self-constituted guardians of Olympia, Limited, and its shareholders tell those whom they invite to join with them in their enterprise: "The promoters of this company, hereinafter called the vendors, who constitute the entire board of the company which lately produced 'Venice in London,' recently entered into a contract on behalf of a syndicate of which they themselves are members, for the purchase of the entire Olympia property. The vendors effected this purchase on the 8th February, 1893, at competition before the chief clerk of Mr. Justice North in the Chancery Division of the High Court of Justice for the sum of 140,000*l.* payable in cash, and they will, acting on behalf of such syndicate, be the vendors of that property to this company. . . . Any other profits made by the syndicate from interim investments are excluded from the sale to the company. A printed form of the memorandum of agreement which was signed by each member of that syndicate may be inspected by intending applicants for shares or debentures at the offices of the solicitors of the company. The vendors have agreed to resell to the company the whole of the property purchased by them on the 8th February, 1893, for the sum of 180,000*l.* (being nearly 18,000*l.* less than the amount of Messrs. Driver & Co.'s valuation) payable as to 155,000*l.* in cash, and the balance in cash or shares of the company. . . . Out of the profit to be made by the vendors on behalf of the syndicate the vendors have agreed to pay interest at the rate of 5 per cent. per annum upon the amount for the time being paid up on the shares and debentures until the opening of the first entertainment. They will also provide all the preliminary expenses of the formation and bringing out of the company, and the issue of its capital up to and including allotment, and all costs including stamp duty in connection with the completion of the purchase of the property and the mortgage to secure debentures. The conveyance will be made direct to the company by direction of the vendors."

My Lords, it is a trite observation that every document as against its author must be read in the sense which it was intended to convey. And everybody knows that sometimes

half a truth is no better than a downright falsehood. Is the statement in the prospectus which I have just read as to the price which the vendors had to pay for the property true or false? In the letter it is true. The vendors had bid 140,000*l.* for the property, and had formally agreed to pay that sum for it. But for all that, the sum of 140,000*l.* was not the sum they were going to pay, and they knew that well enough. They had provided themselves with counters, obtained at little cost, which in reckoning the price would be taken, as they knew, at their face value, so that the price of the property to them would be only about 120,000*l.* Is that what Mr. Gluckstein and his associates meant the public to understand? Surely ordinary persons reading the prospectus, and attracted by the hopes of profit held out by it, would say to themselves, "Here is a scheme which promises well. The gentlemen who are putting the property on the market know something about it, for they were the sole directors and managers of 'Venice in London,' which was a very profitable speculation. They have had the whole property valued by well-known auctioneers, who say that it is worth more than is asked for it. True, they secure a profit of 40,000*l.* for themselves, but then they disclose it frankly, and it is not all clear profit. There is interest to be paid, and all the expense of forming the company. And they have actually agreed to pay 140,000*l.* down. That sum, they tell us, is 'payable in cash.'" You will observe those last words, "payable in cash." Their introduction is almost a stroke of genius. That slight touch seems to give an air of reality and bona fides to the story. Would anybody after that suppose that the directors were only going to pay 120,000*l.* for the property, and pocket the difference without saying anything to the shareholders? "But then," says Mr. Gluckstein, "there is something in the prospectus about 'interim investments,' and if you had only distrusted us properly and read the prospectus with the caution with which all prospectuses ought to be read, and sifted the matter to the bottom, you might have found a clue to our meaning. You might have discovered that what we call 'interim investments' was really the abatement in price effected by purchasing charges on the property at a

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discount." My Lords, I decline altogether to take any notice of such an argument. I think the statement in the prospectus as to the price of the property was deliberately intended to mislead the shareholders and to conceal the truth from them.

My Lords, on so plain a case as this I am very reluctant to quote any authority; but I think I ought to call your Lordships' attention to the case of *Hichens* v. *Congreve* (1), to which I have already alluded, and that for two reasons: first, because it seems to have been lost sight of in the argument of this case; and, secondly, because the facts there have a singular resemblance to the facts of the present case. The defences in the two cases are, for the most part, identical.

Hichens v. *Congreve* (1) was decided by Shadwell V.-C. in 1831. There had been a demurrer to the bill, which was overruled by the Vice-Chancellor and by Lyndhurst L.C. on appeal, a motion for payment of money into court, which was successful, and then the case came on for hearing. The facts were these: A Mr. Flattery was the fortunate possessor of a property in Ireland containing treasures of coal and iron, rarely met with on the other side of the channel, and he was anxious to dispose of it. One Sir William Congreve entered into negotiations with him, and found that he was willing to sell for the modest sum of 10,000*l.* Then Sir William associated with himself two gentlemen of the name of Clarke, and the three proposed to themselves to buy the property, and work it by means of a company. But they thought that the company could well afford to pay 25,000*l.* for it, and they supposed that they might honestly, or, at any rate, without being found out, put the extra 15,000*l.* into their own pockets, concealing from the proposed shareholders the difference in price. Mr. Flattery seems to have been not unwilling to lend himself to the scheme. So a contract was drawn up for the sale of the property from Mr. Flattery to the trustees of the company for the price of 25,000*l.*, out of which, of course, Mr. Flattery was only to keep 10,000*l.* Sir William Congreve and the two Clarkes got up the company, issued a prospectus, and prepared a deed of settlement stating that the property had been bought from Mr.

(1) (1828) 4 Russ. 562; (1829) 1 R. & M. 150; (1831) 4 Sim. 420.

Flattery for 25,000*l.*; and they appointed themselves and other persons directors of the company. A large sum of money was collected, a large body of subscribers executed the deed of settlement, and later on a private Act of Parliament was obtained establishing and regulating, but not incorporating, the company. Some years afterwards the proceedings of Sir William Congreve and his associates were discovered, and a bill was filed by certain shareholders on behalf of themselves and the rest of the shareholders other than the defendants to compel them to refund the 15,000*l.* As the Vice-Chancellor pointed out, if Sir William Congreve and the Messrs. Clarke had agreed among themselves that they would form a partnership or a company for the purpose of working the mines, and had held out to the persons who should form the company that it should be formed on the basis that they should pay 15,000*l.* to Sir William Congreve and the Messrs. Clarke as the consideration for their having the mines, no objection whatever could have been made to the transaction. But the objection was that the real transaction was not disclosed, and "that the persons who became members of the company could not possibly know that it was the intention of Sir William Congreve and the Messrs. Clarke that the 15,000*l.* should be paid out of the funds of the company for the benefit of Sir William Congreve, the Messrs. Clarke, and those gentlemen whom they permitted to participate in it."

Then the Vice-Chancellor, after stating the facts and relevant documents, proceeds as follows: "It is useless for the Messrs. Clarke and Sir William Congreve to state, as they have done, in their answers that they apprehended that the sums which so came to their hands were profits which they were entitled to; for it is impossible that they could, if they fairly exercised their judgments which as directors they were bound to exercise, form any such opinion; and it is perfectly plain to my mind that it was not competent to those who were forming a company thus to deal with the funds of the company, making at the same time the representations which they did make. If they had been dealing with one individual only, no doubt could be entertained upon the matter. Two objections were made to the relief that is asked in this case. First it was said that the

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property was worth 25,000*l.* So it might have been; but in my opinion the value of the property is quite immaterial, for the question here is what was held out to the company to have been the sum actually paid for it, and I conceive that if there was a misrepresentation in that respect, the parties who made that representation must be answerable for it. The other objection that was made was that the mines were not, and could not have been, purchased for the company; for that at the time when the agreement was entered into there was no company in existence. Strictly speaking it is true that there was no company in existence; but these gentlemen were endeavouring to form a company, and they had taken upon themselves the character of directors for the benefit of all persons who had agreed to be, or might afterwards become, members of the company. The 25,000*l.* was to be paid out of the funds which should be subscribed by persons who might thereafter become members of the company, and my opinion, therefore, is that all those persons who might thereafter become members of the company through the instrumentality and representations of those directors are entitled to the protection of this Court. Then it was said that there can be no relief except in the way of restitution of the mines; but that appears to me to be a fallacy. On the 22nd of June 1825 an Act of Parliament was passed which establishes this company and directs that its capital shall be 300,000*l.*; and I apprehend that in no other way can there be any relief in this case than by making those who have subtracted the 15,000*l.* from the funds of this company repay that sum, for it would be no relief to make Flattery take back the mines: that would destroy the company altogether. When these directors represented that 25,000*l.* was to be paid for the purchase of the mines it must be considered that they intended that the company should have the mines, and that they meant it to be understood that that was the lowest price at which they could be purchased. What is complained of is that by improper representation 15,000*l.* has been withdrawn from the funds of the company and paid into the pocket of private individuals. Is it not obvious, therefore, that the relief to be given is the restitution of the 15,000*l.*?"

My Lords, I need not comment on the Vice-Chancellor's judgment. It seems to me to cover the whole of the present case except the defence founded on the provisions of the Companies Act, 1862, and with that I have already dealt.

There are two things in this case which puzzle me much, and I do not suppose that I shall ever understand them. I mention them merely because I should be very sorry if it were thought that in those two matters the House unanimously approved of what has been done. I do not understand why Mr. Gluckstein and his associates were not called upon to refund the whole of the money which they misappropriated. What they did with it, whether they put it in their own pockets or distributed it among their confederates, or spent it in charity, seems to me absolutely immaterial. In the next place, I do not understand why Mr. Gluckstein was only charged with interest at the rate of 3 per cent. I should have thought it was a case for penal interest.

In these two matters Mr. Gluckstein has been in my opinion extremely fortunate. But he complains that he may have a difficulty in recovering from his co-directors their share of the spoil, and he asks that the official liquidator may proceed against his associates before calling upon him to make good the whole amount with which he has been charged. My Lords, there may be occasions in which that would be a proper course to take. But I cannot think that this is a case in which any indulgence ought to be shewn to Mr. Gluckstein. He may or may not be able to recover a contribution from those who joined with him in defrauding the company. He can bring an action at law if he likes. If he hesitates to take that course or takes it and fails, then his only remedy lies in an appeal to that sense of honour which is popularly supposed to exist among robbers of a humbler type.

I agree that the appeal must be dismissed with costs.

LORD ROBERTSON. My Lords, I am satisfied of the liability of the appellant. Once the facts are analyzed (and this has been done thoroughly in the Court of Appeal) they are seen to be of no ambiguous import. The appearance of complexity which

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the case presents arises from the matters in hand having been dressed up artificially, so that things have been separated in language and treatment which in their nature are inseparable and correlative.

To my thinking, the central fact in the history is, that while the object of the syndicate was to make profit out of the resale of Olympia, it was an essential part of the enterprise, as originally designed and as actually carried out, that the same individuals who sold as syndicate should buy as directors. This was provided by the third head of the agreement which set up the syndicate, and it has a far-reaching effect at all the stages of the argument.

First of all, it seems to me to conclude the question whether these gentlemen were promoters when they bought the mortgages. I do not lay out of account the refreshment contract and the advertising contract, for the entering into contracts for the company is a clear assumption of agency and, therefore, of a fiduciary relation to it. But apart from those contracts, where speculators have formed, exclusively of themselves, the directorate of a company, to be immediately floated for the purpose of buying the property which those same individuals are associated to acquire and resell, they have brought themselves directly within Lord Cairns's statement of the law in *Erlanger's Case*. (1) They have taken a decisive step in shaping and limiting the company. It may well be asked, if this be not an act of promotion what is? The hypothesis of all the law which we are considering is that the company is not yet formed; and unless these gentlemen had registered the company (and thus passed out of this stage altogether) it is difficult to see what more overt acts of promoting and forming the company they could have done.

The only available argument against this conclusion was that the gentlemen forming the syndicate might have changed their minds and sold to an individual. This is true, but true only in the sense that, till registration of the company and a bargain with the company, they were free to change their minds—true in the sense in which every enterprise not actually

(1) 3 App. Cas. 1218.

consummated may be abandoned. But as matter of fact, these men intended, when they bought the mortgages, to sell to a company constituted in the mode and form described; and they did sell to that company. The appellant in his evidence avows it; and the other facts are indicative, to the point of conclusiveness, that nothing but a company would have served the ends of the syndicate. The mere expression in a deed of the truism that the adventurers could sell to an individual if they did not sell to a company can never avail against the ascertainment of the true facts of the scheme.

The facts here are that the company had been so far organised that its executive was provisionally appointed. The directors of a company are its executive organ; to them its interests are confided; and in the present instance the company, even in this, its inchoate stage, was identifiable through its executive. I hold that from the moment this step was taken the coming directors stood in a fiduciary relation to the company whose interests were to be in their sole hands. This conclusion rests not on technical rules of law, but on the dictates of fair play embodied in law. The people for whom these gentlemen were bound to act were their coming constituents, the persons out of whose money they proposed to make their gain.

And now I pass to the next stage of the case. Assuming the members of the syndicate to have been promoters at the date of the purchase of the mortgages, did they properly disclose it? In the skilful argument for the appellant the duty of disclosure on this hypothesis was conceded. But this concession must not disarm the criticism which, in considering the adequacy of the disclosure, first ascertains the relevancy of the transaction to the question what sum ought to be paid by the directors for the mortgaged property.

The theory of the appellant is that the purchase of the mortgages was a collateral and independent transaction. It seems to me, on the contrary, to be an essential and inseparable part of one and the same transaction, and for this plain reason that the syndicate's gain on the mortgages had to be paid by the company. The relevancy of the mortgage transaction to the

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question solved by the syndicate sitting as directors is this—a company, or any one else, considering what price shall be paid draws inferences as to the true value from the price paid by the seller and the proposed advance on that price. In short, what the possible buyer wants to know is the profit to be made by his seller. He may be entitled to know this, or he may not, according as his seller is bound or is not bound to disclose it, but the materiality of the knowledge is indisputable. Again, this transaction had another importance. The inference of value drawn from a competitive sale by auction is founded on the assumption that the sum paid was the least that the property could have been got for. In the present case, that inference would have been unsound. I do not know whether it was necessary, in order to secure the property, that the syndicate in their last bid should advance by 8000*l.*, whereas all previous advances had been only of 1000*l.* But I do know that the appellant had no interest to bid 133,000*l.* rather than 140,000*l.*, for by the time the biddings had run thus high it was certain that the mortgages would be paid in full, and, as the syndicate knew that the directors would pay their price, it was indifferent to them, to the matter of a few thousands, whether the price which they nominally, and the shareholders really, paid to the vendor was more or less.

On these grounds I consider that the transaction in mortgages was so relevant to the question what price should the company pay for the property that it was necessary that it should be disclosed to the company completely and in detail, and the question is whether this was done. There are several overwhelming reasons for a negative answer.

In the normal case, where the directors are truly and not merely in name the executive of the company, it may be assumed that they will be vigilant and critical of the particulars of a bargain of such paramount importance as the purchase of the property to be traded with, and that, dealing at arm's length, they will examine into anything bearing on that matter that does not tell its own story in its face. But, in the present case, the company was paralyzed so far as vigilance and criticism were concerned; for the board-room was occupied by the enemy.

Now, the question whether adequate disclosure has been made to a company by a vendor bound to do so must necessarily depend upon the intelligence brought to bear on the information. And if, by his own act, the promoter has weakened, or, as here, has annulled the directorate, his case on disclosure becomes extremely arduous—for he has to make out such disclosure to shareholders as makes directors unnecessary. How this could be done we have no occasion to consider, for the appellant is not within sight of doing it. Indeed, the case is so clear that I do not think it is a case of inadequate disclosure, but of direct misrepresentation. Two statements were made which are clearly of that character. The one is the assertion that the purchase of the mortgages was a temporary investment. If this means anything, it means that the syndicate having money on hand awaiting investment in one thing had temporarily put it to another. The contrary is the fact: part of the price of the mortgages was subscribed by the syndicate for its purposes of which this was, in terms, one; and much the greater part was borrowed from their bankers ad hoc. The second overt misrepresentation is that the syndicate had paid 140,000*l.* for the property, whereas the truth is that they were paying only 119,265*l.* 13*s.* 11*d.*, the excuse for the former sum having been stated coming to no more than this—that they had to pay the vendor before their own accounts were closed.

I have only to add that I consider the liability of the appellant for the whole sum in the order appealed against to be the necessary result of the ground of judgment which I adopt.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, April 5, 1900.

Solicitors: *Lewis & Lewis; Roderic Oliver.*

[HOUSE OF LORDS.]

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THE NORTH EASTERN RAILWAY COMPANY . . . . . } APPELLANTS;

AND

LORD HASTINGS . . . . . RESPONDENT.

Landowner—Railway Company—Agreement for Lease—Way-leave—Construction—Ancient Document—Contemporaneous Usage or Interpretation.

By deed in 1854 H. agreed to grant to a railway company a way-leave and right to make railways through his land for the term of 1000 years, the company paying H. a specified rent on coal carried over "any part of the railways comprehended in" a bill which afterwards became the company's special Act of 1854 and which should be shipped at Port B. The railways were constructed and for more than forty years rent was paid by the company for coal carried over the railways and shipped at Port B., when the coal passed over H.'s land, no rent being paid or claimed for coal carried over the railways and shipped at Port B. but not passing over H.'s land. In an action brought by H.'s successor against the company:—

Held, that the words in the deed were plain and unambiguous; that the fact that the parties had interpreted the words in a sense different from that which the words themselves plainly bore could not affect the construction; that the company were liable to pay the rent upon coal conveyed over any part of the railways comprehended in the special Act and shipped at Port B., although it did not pass over H.'s land, and that the plaintiff was entitled to an account for the six years prior to the issue of the writ.

The decision of the Court of Appeal, [1899] 1 Ch. 656, affirmed.

By an indenture of May 18, 1854, and made between the then Lord Hastings and the Blyth and Tyne Railway Company, after reciting that a bill was then pending in Parliament for the purpose (inter alia) of enabling the company to continue and make certain railways upon Lord Hastings' lands, Lord Hastings and the company covenanted that Lord Hastings would grant by indenture and the company would accept a grant of a way-leave over certain portions of Lord Hastings' lands. Then followed a form of lease to be executed after the passing of the bill.

By this form of lease Lord Hastings was to grant to the com-

pany full way-leave and power to make certain railways and works, or such parts thereof as were to pass through the lands of Lord Hastings, and which last-mentioned parts were thereinafter called and intended by the expression "the said railways," to hold for 1000 years from May Day 1845; yielding and paying every year the rent of 5*s.* for every ten of coals &c. (not comprised in the other reservations) which should pass over "the said railways" or any part thereof respectively; and yielding and paying on coals &c. conveyed over "*any part of the railways comprehended in the Blyth and Tyne Railway Consolidation and Extensions Act* 1854" and which should be shipped at the port of Blyth (other than certain coals &c. not necessary to refer to in this report) the sum of 3*s.* per ten. The question in this appeal turned upon the construction of the words in italics. The form of lease contained further reservations of rents, and a covenant by the company to deliver monthly accounts of all coals &c. conveyed over "the said railways," with power to Lord Hastings to inspect the company's books and employ clerks to take accounts relating to coals &c. conveyed "over the said railways." The form of lease did not contain any such covenant or power with regard to coals &c. conveyed over the railways comprehended in the Blyth and Tyne Railway Consolidation and Extensions Act 1854 and shipped at the port of Blyth.

The bill above referred to became the Blyth and Tyne Railway Consolidation and Extensions Act 1854, and the railways thereby authorized were continued and made, including a branch called the Morpeth Branch which crossed Lord Hastings' lands and by which coal was carried to Port Blyth. No formal lease was executed, but the parties acted under the indenture of May 18, 1854. For more than forty years thereafter the railway company and their successors the appellants conveyed coal &c. over portions of the railways comprehended in the Blyth and Tyne Railway Consolidation and Extensions Act 1854 to the port of Blyth, but paid the rent of 3*s.* per ten only in respect of such coal &c. as was so conveyed over the lands of Lord Hastings, and no claim was ever made on behalf of Lord Hastings except in respect of coal &c. conveyed over part of

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his lands, although it was known that coal &c. was conveyed over the railways comprehended in the Act of 1854 to the port of Blyth which did not pass over Lord Hastings' lands and for which no payment was made. Under a special Act of 1893 the appellants made a railway communicating with the Morpeth Branch, thus making a fresh route by which they carried coal &c. to be shipped at Port Blyth without passing over any of Lord Hastings' lands.

In 1897 the respondent brought an action against the appellants claiming an account and payment in respect of coal &c. conveyed over the Morpeth Branch, and shipped at the port of Blyth, whether the coal &c. did or did not pass over any part of the respondent's lands. Byrne J. made a declaration that the plaintiff was entitled to the rent of 3*s.* per ten on all coal &c. conveyed over any part of the railways comprehended in the special Act of 1854 and shipped at the port of Blyth (other than etc.), and ordered an account to be taken for a period of six years prior to the issue of the writ. (1) This decision was affirmed by the Court of Appeal (Lindley M.R., Rigby and Vaughan Williams L.JJ.). (2)

March 22, 23, 27. *Swinfen Eady Q.C.* and *Astbury Q.C.* (*Mackarness* with him) for the appellants contended that upon the true construction of the indenture of May 18, 1854, looking at the whole, there was no claim to the rent of 3*s.* per ten in respect of any coal &c. conveyed over the railways comprehended in the Act of 1854 and shipped at the port of Blyth, when that coal &c. did not pass over any part of the respondent's lands: that the acts of both parties for more than forty years shewed clearly that this was the intention and the construction put upon the words by those who made the bargain, and that the interpretation so put upon the words bound the respondent. They referred to the cases cited in the judgments here and in the Court below. (2)

Eve Q.C. and *G. Henderson* for the respondent.

Swinfen Eady Q.C. in reply.

The House took time for consideration.

(1) [1898] 2 Ch. 674. (2) [1899] 1 Ch. 656.

April 5. EARL OF HALSBURY L.C. My Lords, in this case I think the whole question turns upon a very few words to be found in the instrument under construction. A variety of circumstances have been insisted upon to alter the construction which the words themselves naturally bear, but I am unable to see that either in the language used or on the construction of the whole instrument there is any room for doubt.

The chief argument used to give an unnatural construction of the words is that the parties have so acted during a period of forty years that the only reasonable inference to be derived from their conduct is that they have understood and acted on their bargain in a sense different from that which the words themselves convey. I am of opinion that if this could be truly asserted it is nothing to the purpose. The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous.

So far as I am aware, no principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself. More than a hundred years ago a case arose in the Court of Queen's Bench—*Clifton* v. *Walmesley* (1)—in which under a demise of certain coal mines the lessee had covenanted to pay (among other rents and royalties reserved) one-half part or share of all such sum or sums of money as any of the coal to be gotten by virtue of the said indenture should sell for at the pit's mouth. At the time when the covenant was drawn all the coal was sold at the pit's mouth; but after that time a canal had been made and an opportunity afforded of carrying the coal to a more distant market, where it was sold at an enhanced price. For a period of ten years the lessee had paid to the lessor the half of the enhanced price when the coal was sold at the distant market, and the same line of argument was presented in that case which has been put before your Lordships here. It was said that the circumstances shewed

(1) (1794) 5 T. R. 564.

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what the real meaning of the parties must have been, namely, that the lessor should receive one-half of the price which the coal produced in the market, and it was urged that the Court would not tie down the parties to the mere words, but would look to the meaning; that for a period of ten years the parties had acted on that view of the contract, and whether the coal was sold further from the pit or nearer to it could not possibly vary the real rights of the parties. The Court rejected the evidence and held that the covenant, not being ambiguous in its terms, could not be explained in the way suggested.

It certainly in that case could not have been much matter of doubt that what the parties really had in their minds—if one had been at liberty to reject the words of the covenant or treat them as ambiguous—was that the lessor should obtain one-half of the selling price of the coal. As was argued by the learned counsel in that case, it was very difficult to conceive any hypothesis upon which a distinction should have been insisted on as to the place of sale. It may be that in particular instances an adherence to the letter of a contract may produce an apparent injustice, but a different rule would render all contracts uncertain and would produce much graver injustice.

And in the case of *Trustees of Clyde Navigation* v. *Laird* (1) Lord Blackburn says: "But though I think the reasonableness of a scheme is a very good reason for thinking that the Legislature might have wished to adopt it, and therefore for construing the words as shewing an intention to carry it out, if the words used will bear such a sense, it affords no justification for introducing new words, or construing the words used in a sense which they cannot bear, and I find no words in this Act of 1858 capable of bearing a meaning which would shew that the Legislature intended this reasonable scheme. I equally fail to see words indicating an intention to make this perhaps not unreasonable exemption from the general rate if it were imposed."

Now, the facts out of which this case arises are simple enough. In May 1853 Lord Hastings granted certain wayleaves to the railway company, and, without going very minutely

(1) (1883) 8 App. Cas. 668.

into the terms of the instrument in question, it is enough to say that the way-leave then granted, or agreed to be granted, was a way-leave by which on certain terms the coal going over any part of the railways which crossed Lord Hastings' land should pay certain rates. It cannot be denied that in this agreement the sole right of Lord Hastings was to claim in respect of railways or parts of railways conveying coal through or over his own land. But the agreement of May, 1854, is the instrument upon which the question arises. Certain way-leaves and rights in respect of them are granted by Lord Hastings, and the whole question is whether in this instrument, like that of 1853, the right to get rents or sums is dependent upon whether the coal carried is carried through or over any part of Lord Hastings' land.

The appellants seek to limit it by suggesting that the real meaning of the words used must be read by the light of the earlier agreement in which undoubtedly Lord Hastings' rights were limited to coal carried over some portion of his land. But I am very clearly of opinion that no such limitation can be imported. I agree with the Master of the Rolls that the clause under construction is clear and unambiguous. It is not denied that the language of the covenant, namely, "the railways comprehended in the Blyth and Tyne Railway Consolidation and Extensions Act 1854," is conclusive against the appellants unless those words can be read in some different sense, and I am wholly unable to see how they can be.

The coal in respect of which way-leave rent has been charged and which has not been paid undoubtedly did pass over railways comprehended in this description, and it is sought to qualify the rights of Lord Hastings under this instrument by three considerations: First, it is said that it is unreasonable that Lord Hastings should receive way-leave rent in respect of coal passing over a railway, or part of a railway, which was not on Lord Hastings' land. But it is a very familiar thing that in granting similar rights a proprietor will protect himself against an evasion of the obligations by a railway company to guard against alternative routes by which, when a railway company has obtained, so to speak, the key of the situation,

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it may render a reservation of rents for way-leaves of little value.

Next, it is said that the instrument reserves no rights of inspection, or right to account, whereas such rights are expressly given in respect of such portions of the railway as pass over Lord Hastings' land, and this is true; but though it may go to shew the bad drafting which the appellants so strongly insist on, I am wholly at a loss to see that the absence of such provisions can affect the plain and unambiguous words in which the obligation to pay is created.

The next argument is the practice, which has prevailed for forty years between the parties, which it is said is inconsistent with the only sense in which the words creating the obligation can be understood.

I think the argument is overstated, since there may have been circumstances which caused one particular pit, which was undoubtedly comprehended within the language of the covenant, not to be called upon to pay. That question has neither been litigated nor inquired into, and I am not at liberty to inquire into it; but whatever may be the history of it, it cannot affect the generality of the covenant or its construction between these parties, whatever may be the rights of the proprietor of the Cowpen Colliery. What those circumstances were, and how it happened that the coal carried from that pit over part of the designated lines was not charged for, I do not know, nor am I at liberty to conjecture.

It may be that circumstances peculiar to itself or an agreement with the owner of it caused this omission; but now that an alternative line has been created by legislation it is difficult to see what relation that immunity has to the claim in respect of the coal carried by that alternative line. But in truth I do not think I have any right to know what the parties have done. I think in strictness the course they have pursued is not evidence. I think the true view is that laid down by Lord Kenyon in 1794, and I have no right to construe the covenant now in question differently from the mode in which I should have construed it if the controversy had arisen the day after the agreement had been executed.

My Lords, for these reasons I must adhere to the judgment given by Byrne J. and by the Court of Appeal, and move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I agree. I cannot see my way to differ from the view expressed by Byrne J. and by the Court of Appeal. There is not in my opinion any ambiguity of any sort in the clause which has given rise to so much discussion at the bar, and therefore I think the agreement must have effect according to the plain meaning of the language the parties have deliberately chosen to employ.

LORD DAVEY. My Lords, in this case we have to construe an instrument which has never been executed as a deed, but is contained in an agreement dated May 18, 1854, which binds the parties to execute one in that form. It is not an executory instrument, because there is nothing left for the draftsman to settle, and your Lordships have to construe it in the same way as if it were an executed deed.

It cannot be denied that there are provisions in this instrument which read literally are not in harmony with other provisions to be found in it, and in one not unimportant respect, namely, the proviso against the payment of double rents under this deed and the previous way-leave lease of 1853, it is impossible to make the words fit what was agreed on both sides of the bar to have been the real intention. The principle on which an instrument of this description should be construed is not doubtful. It is (to quote the words of Lord Watson in an unreported case (1)) that the deed must be read as a whole in order to ascertain the true meaning of its several clauses, and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible, or (as was said by Lord Selborne) you may disregard the literal meaning of the words and give them another meaning if the words are sufficiently flexible to

(1) *Chamber Colliery Co., Limited* v. *Twyerould*, H. L., July 20, 1893.

H. L. (E.) 1900 NORTH EASTERN RAILWAY v. HASTINGS (LORD). Lord Davey.

bear that interpretation: *Caledonian Ry. Co.* v. *North British Ry. Co.* (1)

Applying this rule of construction to this deed, I am disposed to construe the second reservation as confined to coals, &c., conveyed over Lord Hastings' land, if the words will legitimately bear that construction. If this construction could be adopted it would have the effect of harmonising all the parts of the deed and making it consistent throughout. It would be in accordance with what may primâ facie, from the subject-matter of the grant, from the other contents of the instrument, and from the absence of any recital in the agreement of 1854 shewing an intention to charge a royalty on coals not carried over Lord Hastings' land, be presumed to be the intention of the parties.

It may I think be argued with some force that as the words "the said railways" in the first reservation bear the artificial meaning of "such parts of the railways and works as pass through the land of Lord Hastings," so the words "the railways comprehended" in the Act of 1854 in the second reservation may have the meaning not less and not more artificial of "such parts of those railways as pass through the lands of Lord Hastings." But after mature consideration I have somewhat reluctantly come to the conclusion that to put that meaning on the very plain words of the second reservation would be, not to construe the words which are there, but to add other words which are not there. I therefore feel constrained, though with some hesitation, to concur in the interpretation your Lordships have given to these words.

My Lords, I have formed my opinion on what is to be found within the four corners of the instrument to be construed without adverting to the fact that the actings of the parties for forty-three years before the commencement of the action have been inconsistent with the view taken by your Lordships. I do not think that I could properly advise your Lordships to hold that the actings of the parties during that period, which does not exceed the limits of living memory, is evidence upon which you can act without other grounds for doing so of a lost agreement

(1) 6 App. Cas. 114.

varying that of 1854, or, which is the same thing in another form, adopt the construction acted on by the parties as contemporanea expositio. To do so would be inconsistent with what was said by Lord Blackburn and Lord Watson in this House in *Clyde Trustees* v. *Laird* (1) speaking in 1883 of an Act passed in 1858, and so far as I know would be unsupported by any authority. But (adopting Lord Blackburn's language in that case) I think that the fact of the respondent and his predecessor having acquiesced in this construction against their own pecuniary interest for this length of time raises a strong primâ facie ground for thinking that there must exist some legal ground on which they could not resist, and a court should be cautious and not decide unnecessarily that there is no such ground. Now, my Lords, it appears that the only case in which until recently the respondent might have claimed the royalty now claimed, and which your Lordships think he is entitled to, is the coal led from a colliery called the Cowpen Colliery. It also appears from the first agreement of April 27, 1852, that there was some previous right of way-leave belonging to the proprietors of that colliery which became vested in the railway company, and it was suggested by the counsel for the respondents that there might be some explanation, the clue to which was now lost, why the respondent and his predecessor did not claim the full royalty they were apparently entitled to upon coal carried from the Cowpen Colliery.

It occurred to me at one time that in these circumstances we might except coal from Cowpen Colliery from the operation of Byrne J.'s decree; but I agree with my noble and learned friend on the Woolsack that this variation has never been asked for by the appellants, and the question has not been made the subject of investigation, and, therefore, there are no sufficient materials before the House on which your Lordships would be justified in making such a variation in the decree. I therefore agree in the judgment which has been moved.

LORD BRAMPTON. My Lords, I also agree in the opinion that this appeal should be dismissed. The whole question

(1) 8 App. Cas. 658.

H. L. (E.) 1900 NORTH EASTERN RAILWAY v. HASTINGS (LORD).

Lord Brampton.

turns upon the construction of that short clause contained in the agreement of May 18, 1854, which I need only refer to.

As it stands, it seems to me to be clear and free from ambiguity, and incapable of any other construction than that assigned to it by the respondent. Certainly there is nothing to be found in the rest of the agreement to suggest any other interpretation. But it is said that it must have been differently understood by the parties themselves, and that the omission by the plaintiff and his predecessor for upwards of forty years to claim the rents now sought to be recovered is cogent evidence that such was the case. I grant that if the clause were capable of two constructions, one of which would support, the other of which would defeat the claim, the omission would afford irresistible proof that the latter was the interpretation intended by the parties. No such ambiguity, however, exists, and it seems therefore to me that, in the absence of any proof to the contrary, it must be assumed that the parties knew and understood the language they were using, and that in executing the agreement containing that clause they were truly expressing their intentions, and are bound by the writing they have signed. Why the agreement was so framed—what were the considerations which induced it—and why the claim was so long allowed to sleep are mere matters of speculation; but one has no right to act upon speculation to set aside a deed or agreement which is on the face of it clear and definite.

This appeal ought therefore to be dismissed with costs.

LORD ROBERTSON. My Lords, I agree, for the reasons stated by my noble and learned friend on the Woolsack.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, April 5, 1900.

Solicitors: *Williamson, Hill & Co., for A. K. Butterworth, York; Bircham & Co.*

[HOUSE OF LORDS.]

WYMAN OR FERGUSON (PAUPER) . . APPELLANT;

AND

PATERSON AND OTHERS . . . . . RESPONDENTS.

H. L. (Sc.)
1900
March 13.

Trust—Liability of Trustee—Negligence—Immunity Clause—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 17, *sub-s.* 3.

Three persons were trustees of a fund set apart to answer a life annuity and divisible on the decease of the annuitant among the persons entitled in remainder. The sum of 3700*l.*, part of this fund, was invested on a heritable bond. On July 15, 1887, the bond was paid off. The trustees allowed their law agent to receive the money, and to retain it in his hands uninvested for rather over six months. At the end of that time the law agent became bankrupt, and the greater part of the fund was lost:—

Held, reversing the decision of the First Division of the Court of Session (Lord Morris dissenting), that the trustees were guilty of a plain and positive breach of trust, and were liable to replace the money lost.

APPEAL from the First Division of the Court of Session, Scotland. (1)

The appellant, Mrs. Wyman or Ferguson, was with her deceased husband beneficially interested in the trust estate of the deceased James Ferguson, Edinburgh, and she sought to have a sum of 3140*l.* 12*s.* 2*d.* with interest at 5 per cent. repaid to the trust estate. The said sum was lost in January, 1888, through the defalcations of the then agent and factor of the trustees, the late John Clark Junner, W.S. At the time when the said money was lost to the trust estate the respondent, John Paterson, and the late William Lyon and Robert Gordon were the sole surviving and acting trustees of James Ferguson's trust. The trust deed, which was dated 1854, contained the following immunity clause: 6. "My said trustees shall not be liable for the intromissions of such factors . . . .; neither shall they be liable for any agent who, in transacting the business of this trust, shall receive any part of my said estate into his hands: And I

(1) (1898) 25 R. 697.

H. L. (Sc.) 1900 WYMAN v. PATERSON.

do hereby declare that my said trustees, whether original or assumed, or tutors or curators after appointed, shall not be liable for omissions or neglect of management, or singuli in solidum, but each only for his own actual intromissions." When the testator's youngest child came of age the trustees realized the trust estate and distributed it among the testator's children, retaining however 4700*l.* to meet the widow's annuity. Of this sum 3700*l.* was lent on bond secured over the estate of and life policy of one Purves. Purves died in February, 1887, and Junner, who was law agent and factor for the trustees, and also, unknown to them, law agent for Purves, informed the trustees that the bond was to be paid up in May, 1887. About the May term Junner intimated to the trustees that owing to a hitch having occurred as regards the payment of Purves's life policy the money would not be forthcoming at the May term. The money was not paid until July 15, 1887. It was alleged that it is unusual in practice to accept repayment of heritable bonds except at the term of Whitsunday or Martinmas after three months' notice previously given. Junner was instructed by the trustees to look out for another heritable investment for the money thus paid to him, but by Martinmas, 1887, Junner had only been able to find an investment for 800*l.* Between July and Martinmas, 1887, the trustees individually called at Junner's office to ascertain if any heritable investment had been got. At a meeting of the trustees held at Junner's office on December 19, 1887, Junner reported that he had not yet been able to find an investment for the balance. Junner was at that meeting asked if the money was on deposit receipt, and he stated that it was; he was then asked to produce the deposit receipt. He explained that his cashier was out, and that he could not then get at the deposit receipt. He was then asked by the trustees to send the deposit receipt to them that they might see it.

On December 20 or 21, 1887, Junner sent a clerk to shew each of the trustees a deposit receipt as follows: "Edinburgh, December 20, 1887. Received from Messrs. Ferguson and Junner, W.S., for behoof of the trustees of the late James Ferguson, three thousand pounds, which is this day placed

to the credit of their deposit account with the British Linen Bank." The respondent Paterson and Gordon told Junner's clerk that the deposit receipt must be altered so that the money should be deposited in the names of the trustees. Two or three days afterwards, the deposit receipt not having been shewn to them altered, Paterson and Lyon went to Ferguson & Junner's office to inquire into the matter, and were then told Junner had met with a serious accident. Paterson called again and frequently sent messages, and on January 17, 1888, in reply to a note requesting the alteration of the deposit receipt, a clerk in Junner's office wrote that "Mr. Junner became most seriously ill on Friday, and it is quite impossible to trouble him with business." On January 19, 1888, the trustees first heard that Junner was in embarrassed circumstances; they immediately employed a new agent, and on the same day intimated to the British Linen Bank that Ferguson & Junner had ceased to act for the trustees, and that they were not authorized to cash the deposit receipt. On January 20 the trustees were informed that Junner had cashed the deposit receipt on the 18th instant, and had remitted the amount by a draft to a solicitor in Dunblane to pay off the amount of another trust for which Junner was agent. Ferguson & Junner's estate was sequestrated, and, after receiving final dividends, the loss to the trust estate was 3140*l.* 12*s.* 2*d.* In 1896 Paterson resigned his office of trustee, and a judicial factor was appointed. In 1897 the appellant and her deceased husband brought the present action.

The First Division of the Court of Session, on March 4, 1898, affirming the interlocutor of the Lord Ordinary, held that the appellant had failed to establish a claim of personal liability against the trustees. (1)

The appeal was twice argued—first, on December 3 and 11, 1899, before the Earl of Halsbury L.C. and Lords Macnaghten and Ludlow; and on the death of Lord Ludlow without leaving a written judgment, the appeal was argued a second time on February 5, 1900, before the Law Lords whose opinions are given below.

(1) 25 R. 697.

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Houston, Q.C. (of the Irish Bar), and *John C. Guy* (of the Scottish Bar), for the appellant. The respondent trustee and the deceased trustees wrongly allowed the trust money to remain under Junner's control for six months. It was the duty of the trustees to know that this money was deposited in Ferguson & Junner's name, of which firm they knew Junner was the sole surviving partner. They also knew that loans on heritable securities are made in Scotland immediately before either the term of Whitsunday or Martinmas, and that, having missed the Whitsunday term to relend, the money remained at hazard until the next Martinmas term. Therefore it was clearly the trustees' first duty to make certain that the money was immediately placed in the trustees' names, and not liable to be paid out or transferred without their consent.

Secondly, the immunity clause did not bar liability for a positive breach of trust: *Knox* v. *Mackinnon* (1); *Rae* v. *Meek* (2); *Dix* v. *Burford* (3); *Life Association of Scotland* v. *Siddal* (4); *Whiteley* v. *Learoyd.* (5)

Asher, D.F., and *Henry Johnston, Q.C.* (both of the Scottish Bar), for the respondents. There was no breach of trust. Leaving the money in the agent's hands was a mere incident of administration while an investment was looked for. Junner was a man of high reputation, and the trustees had the fullest confidence in him. To have given notice to the bank to retain the money lodged on the deposit receipt would have cast a doubt on Junner's credit. Keeping money in the hands of an agent pending investment was not a breach of trust: furthermore, the trustees did all they could be expected to do in not only making inquiries after the deposit receipt, but warning the bank on January 19.

Secondly, the immunity clause freed the trustees from personal liability for loss sustained by the insolvency of the agent: *Ainslie* v. *Cheape* (6), referred to in *Home* v. *Pringle* (7); *Seton*

(1) (1888) 13 App. Cas. 753.
(2) (1889) 14 App. Cas. 558.
(3) (1854) 19 Beav. 409.
(4) (1861) 3 D. F. & J. 58.
(5) (1887) 12 App. Cas. 727.
(6) (1835) 13 S. 417.
(7) (1841) 2 Rob. App. 384, 434.

v. *Dawson* (1); *Speight* v. *Gaunt*. (2) To hold trustees liable who work under an immunity clause mala fides must be proved. There is no doubt the clause does not protect against gross errors, but it does from all minor carelessness such as this. Where trustees carefully and thoughtfully administer a large fund over very many years, and at the end make a mistake, then the immunity clause comes into effect and exonerates them from personal liability.

[They also cited *Millar* v. *Heritable Reversionary Co.* (3)]

Houston, Q.C., in reply.

EARL OF HALSBURY L.C. My Lords, in my view it is not necessary to go earlier in the history of this case than to note that the 3000*l.* which has been lost through the fraud of the law agents and factors of the respondent was paid to those law agents and factors in the month of July, 1887; but 3000*l.* of the money handed to the agents of the trustees at that time remained uninvested at Martinmas.

The Lord Ordinary in terms says that in his opinion the trustees were quite entitled to entrust the money to the care of their law agent and factor pending an investment being found. This is a somewhat formidable proposition and one to which I cannot assent. How long that may be done appears, according to the breadth of the proposition, to be simply till an investment is found, however long that operation may take.

I am glad to see that the two learned judges of the First Division take a totally different view of a trustee's duty. Lord Adam says: "I see that evidence has been led to the effect that it is a common and recognised practice for agents and factors to deposit trust moneys in their own names, for behoof of their clients. I quite recognise that such moneys as may be necessary for carrying on the current business of the trust should be so deposited or lodged in bank as to be payable on the receipt of agents or factors. But the trust money in question was not at all in that position. It was simply deposited until a permanent investment should be obtained which apparently there was no

(1) (1841) 4 D. 310. (2) (1883) 9 App. Cas. 1.
(3) [1892] A. C. 598.

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immediate prospect of obtaining. It is the duty of the trustees to see that the money entrusted to them is so invested or deposited as not to be exposed to any unnecessary risk. That money deposited in an agent or factor's name is not in that position the result of this case sufficiently demonstrates, and the only reason assigned for taking such receipts in the names of agents or factors, namely, the trouble of obtaining the signatures of the trustees when it is desired to uplift the money, appears to me to be perfectly trivial." And Lord Kinnear takes the same view. His Lordship says: "The chief difficulty in the case arose from the argument which was maintained to us that trustees are justified in allowing factors or agents to mix the funds of the trust with their own. I am clearly of opinion with Lord Adam that this is contrary to their duty and that the reasons which were given for following such a practice are quite inadequate."

My Lords, I am not quite clear why, if these be the principles applicable to the conduct of a trustee, both those learned judges have come to the conclusion that they have to assoilzie the defenders. I cannot understand upon what ground these defenders can escape from the consequences of their negligence, because they not only allowed the agent or factor to deal with the money, but took no pains to ascertain in what manner the money had been deposited.

I observe the learned judge further says that he would have taken a different view of their position had the trustees taken no steps when they became aware that the money in question was not deposited in their own names. But why did they not do so at an earlier date? Whose duty was it to see, not in the month of December, 1887, when for the first time they asked to look at the receipt, but originally when the money was entrusted to the care of their agent or factor? What single act is proved to have been done by these trustees to see (in the words of Lord Kinnear) "that the funds of the trust were not mixed with the funds of the factors and agents"?

I find in Mr. Paterson's evidence that he says, "We were constantly inquiring about the reinvestment of the money." He says at an earlier period of his evidence that the trustees

were informed by the agent that he had no investment that he could recommend. When asked whether it was not leaving the money with the agent to do what he liked with, he says, "It might be so, but it would be reinvested by the agents." The agent told him in reply to his inquiries that he had found nothing suitable that he could recommend.

Now, assuming that it was the duty of the trustees to see that the money was not left in the hands of the agent, what excuse is there that no inquiry was made in the period elapsing between July and December 19?

My Lords, I am not prepared to say that I should not, upon the grounds mentioned by the learned judges, have held the trustees liable on the facts as they stood on December 20. But the facts do not end at that date. On that date the trustees became aware that the money was deposited in the names of the agents and factors themselves. It is brought to their attention, therefore, that the money (in the language of Lord Adam) "was exposed to unnecessary risk," and I understand both the learned judges to whom I have referred are of opinion that it was the duty of the trustees, when that fact was ascertained, to have taken steps to remove that risk, and to have the money invested in the names of the trustees themselves.

The excuse for not doing so appears to me to be wholly inadequate. The fact that the agent had suffered an accident could not have prevented a proper communication to the bank. The only excuse given for not doing so—and the money was allowed to remain for a month in what has been described as an unnecessary risk—is that it might have injured the factor's credit with the bank if any such communication had been made.

I cannot assent to the propriety of such an argument even if an injury to the factor's credit had resulted; but I think nothing could have been easier without any imputation on either the credit or honesty of the factor to communicate with the bank and state, as the fact was assumed to be, that it was only an accident that prevented the money from being properly transferred into the names of the trustees; but they as

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trustees felt it their duty to insist upon its being secured from risk. Moreover, in the event of the factor's death, it might have caused confusion and difficulty. These, to my mind, were ample reasons for a communication to the bank without in the least degree injuring the credit of the factors. This was not done, and in the result the agent was enabled to withdraw the whole sum of 3000*l.* and to use it for his own purposes.

My Lords, I observe that neither of the learned judges who have given judgment nor the Lord Ordinary rely in the judgments they have pronounced on the immunity clause of the trust deed. But the Dean of Faculty has in his very able argument before your Lordships insisted on it that, granting a certain amount of negligence in the conduct of the trustees, it is only such an amount of negligence as is protected by the clause in question.

I confess for myself I have great difficulty in weighing the exact amount of what is described as negligence. But I do not think the question of negligence properly arises upon the facts of this case. It seems to me there was a plain breach of duty, and I do not think that upon the principles laid down in *Seton* v. *Dawson* (1) it is possible to rely on the immunity clause. There was no authority in the trustees to treat their agent and factor as a banker into whose account they might pay the money. If while acting strictly within the character of factor and agent there was something which he might have lawfully done, but which he did fraudulently, it may well be that the liability of the trustees is cut down and qualified by the immunity clause. But in this case it was not as factor or agent in any sense that could be supposed to be covered by that character, but as guardian of the money without any control or check, that the trustees thought proper to allow the defaulting agent to remain in possession of the money.

I am not certain that it is very important to shew that the trustees did know what their duty was. People who undertake a duty are bound to know what their duty requires. But even if it were necessary to shew knowledge, I am clear that in this

(1) 4 D. 310.

case they did know. Their own conduct on December 19 exhibits their knowledge.

Under these circumstances, apart from the original error which, in common with Lord Adam and Lord Kinnear, I think was committed by the trustees, the interval between December 20 and the period when the money was finally lost appears to me to have exhibited on the part of the trustees very gross negligence, for which I think they must be held to be responsible.

My Lords, under these circumstances, I move your Lordships that the judgment of the First Division and that of the Lord Ordinary be reversed, and that judgment be entered for the pursuers, to replace the 3000*l.* odd with interest at 3 per cent.—that amount must be paid to the judicial factor.

LORD MACNAGHTEN. My Lords, I am of the same opinion, and I have only a very few words to add.

If the gentlemen whose conduct is impugned had been English trustees acting in the execution of an English trust the case against them would have been, I think, too clear for argument. And though there seems to have grown up in Scotland an extraordinary laxity of practice, which the learned judges of the First Division reprobate and yet allow, it has not been suggested that there is any difference between the law of England and the law of Scotland as to the duties and liabilities of trustees in regard to the custody and investment of trust funds.

Three gentlemen were trustees of a fund set apart to answer a life annuity and divisible on the death of the annuitant among the persons entitled in remainder. The sum of 3700*l.*, part of this fund, was invested on a heritable bond. On July 15, 1887, the bond was paid off. The trustees allowed their law agent to receive the money and to retain it in his hands uninvested for rather over six months. At the end of that time the law agent became bankrupt, and the greater part of the fund was lost.

The surviving trustee and the representatives of the other two, who are now dead, contend that the trustees are not

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responsible for the loss. In my opinion the trustees were guilty of a plain and positive breach of trust, and are liable to replace the money lost by reason of their gross neglect.

The learned counsel for the appellant said that he did not complain of the trustees allowing the money to be received by the law agent. He admitted that the receipt was proper. My Lords, I think that the learned counsel was probably right in making that admission. But I think the admission ought to have been qualified. If the trustees were justified in allowing their law agent to receive the money on the score of convenience, or, what is much the same thing, because it is in accordance with the ordinary course of business in Scotland, they were not, in my opinion, justified in leaving the money in the law agent's hands for a longer time than might be reasonably required to enable him to pay it over to them.

No Scottish authority was cited on this particular point. Nor is there much authority to be found in England. It is plain that it is no part of the duty of a solicitor as such to receive trust money. And there is an observation of Hart L.C., founded on an unreported case before Lord Eldon, to the effect that if trustees permitted their solicitor to receive trust money and he became bankrupt next day they would be held responsible. (1) That, probably, is an extreme view, and not in accordance with modern opinion. It is, however, unnecessary to pursue the point, because in this country it has been set at rest by the Legislature. The Trustee Act, 1888, authorized trustees to appoint a solicitor to be their agent to receive trust money, but it attached to the authority thus conferred the following proviso: "Nothing herein contained shall exempt a trustee from any liability which he would have incurred if this Act had not passed in case he permits such money . . . . to remain in the hands of the solicitor . . . . for a period longer than is reasonably necessary to enable such solicitor to pay or transfer the same to the trustee." The same provision is to be found in the consolidating Act of 1893. (2)

(1) *Ex parte Townsend*, (1828) 1 Moll. 139.
(2) Trustee Act, 1893, s. 17, sub-s. 3.

I think that this enactment must be taken to be a statutory declaration of the law in this country; and it appears to me that by analogy the law thus declared must be treated as applicable in the case of Scottish trustees.

Tried by this standard, it is obvious that the trustees in the present case committed a gross breach of trust in leaving the money in the hands of their law agent.

The immunity clause does not, in my opinion, afford the trustees any protection. It has been determined in this House that such a clause affords no protection against a positive breach of trust. And although the trustees described their law agent as their factor, and desired that he should be regarded as such, it is obvious that it is no part of a factor's duty to retain in his hands the money of his employers, and to act as their banker. The provision as to immunity in regard to the acts of factors cannot, I think, extend to what the factor is known by the trustee to be doing outside the scope of his employment as factor.

There is only one other observation I desire to make. We were told that the delay was necessary, or at any rate excusable, because the trustees were directed to invest the trust money in heritable securities, and it was difficult to find an eligible security of that description. No doubt the law agent put the trustees off by an excuse of this sort; but the law agent must have known, and the trustees would have known if they had made any inquiry, that under the Trusts (Scotland) Amendment Act, 1884, it was competent for them to invest the trust money in their hands in any one of the securities therein mentioned. The Act places a wide range of investments at the disposal of trustees, although the investments mentioned in the trust disposition may be of a very limited character.

I think the appeal must be allowed.

LORD MORRIS. My Lords, James Ferguson, a pawnbroker in Edinburgh, died about forty-six years ago. He left property estimated between 30,000*l.* and 40,000*l.* He made a trust disposition in December, 1849, and added codicils. He appointed several trustees. The trusts were various and numerous; the

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trustees were also numerous and of very various descriptions. They included two vintners, a baker, a medical doctor, a spirit merchant, a tobacconist, an upholsterer, a shawl merchant, an artist, and a pawnbroker. Such a heterogeneous body of trustees would require an active and efficient factor or agent. The truster by one of his codicils consequently appointed his then agents, Ferguson and Stewart, to be agents for the trustees in the administration of the trusts. They were appointed by and acted as agents for the trustees. By lapse of time the firm altered; Stewart retired; Ferguson took in his place as partner Mr. Junner, and the firm became Ferguson & Junner. Ferguson died in January, 1887, and Junner carried on in the name of Ferguson & Junner until his failure in January, 1888. By the beginning of 1887 all the trust property had been administered except the sum of about 4000*l.*, of which 3700*l.* was outstanding on the bond debt of a Mr. Purves. This debt was paid off by Purves in July, 1887, to Junner, who procured for him the discharge of the three surviving trustees, Messrs. Paterson, Gordon, and Lyon. The two latter died before the institution of this suit. The pursuers do not challenge the payment of the 3700*l.* to Junner, nor that it properly came into his hands—the amount remained with Junner for immediate reinvestment when attainable. The then three surviving trustees—Paterson, Gordon, and Lyon—could not immediately meet, as some of them were absent, and, as the Vacation had either begun or was near at hand, the matter practically stood over until the following Martinmas, though in the interval applications were made to Junner to know if he had got an investment. He did get an investment for an amount of 800*l.*, part of the 3700*l.*, and so apprised the trustees, but stated he was not able to get further investment. The pursuer in this case is beneficially interested in the trust estate, and she seeks to hold Paterson, the surviving trustee, and the representatives of the other two trustees, liable for the fraudulent appropriation by Junner of the residue of the 3700*l.*

The Lord Ordinary, who first heard the case, dismissed the pursuer's claim. On appeal to the judges of the First Division the decision of the Lord Ordinary was affirmed. It is beyond

dispute that the trustees exercised great care and diligence in the administration of the trust estate which was a troublesome and protracted administration. In the year 1887 all was realized and divided except the sum of about 4000*l.*, of which the sum of 3700*l.* paid off by Purves was a part. The trustees were obliged to hold the sum of 4000*l.* to enable them to pay the amounts payable to the truster's widow. After the expiration of a period of over half a century since the execution of the trust disposition, and nearly thirteen years since the alleged breach of trust occurred, your Lordships' House is engaged with a suit against Paterson, the sole surviving trustee of the ten appointed by the trust disposition.

The pursuer complains that the trustees did not keep within their own control the money paid off by Purves, as it is not disputed but that Junner, the factor, properly received the amount so paid off. When then did a breach of duty arise? Two leading solicitors and agents, Messrs. Ritchie and Robson, were examined. They proved that the practice of the profession is to put the trust money when received on deposit receipt in the name of the firm for behoof of the trustees. They also proved that the firm of Furguson & Junner, represented by Junner, was previous to, and up to, the crash in January, 1888, of good and sound character and nothing said against its financial position. Why then should Paterson, a shopkeeper, be held liable as for breach of trust because he did not depart from the usual custom that the money paid to the agent would be deposited in the name of the firm on behalf of the trustees pending investment? It must be remembered the period of payment was at the end of the term and the commencement of the Vacation, running on close up to the following Martinmas. It appears to me there was no breach of duty by the trustees or default in leaving with the agent Junner for so short a period the amount received by him on their behalf.

The pursuers again complain that the trustees, upon seeing the receipt, sent to them on December 20 or 21, should have observed it was only dated December 20, and should have had their suspicions roused, as that date was inconsistent with the

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statement made to them by Junner on December 19, that the money was deposited in the bank on deposit receipt. The respondent Paterson says he did not observe the date. I think that very likely. He had no suspicion of Junner, and did not scan the receipt with a watchmaker's eye. I cannot hold that up to December 21 the trustees had done or omitted to do anything that an ordinary prudent man would not have done or omitted to do. The trustees had repeatedly pressed Mr. Junner to try and procure an investment. They observed he had advertised for it in the newspapers. They had some proof he was active by the fact that he did get an investment for 800*l.* of the amount, and there was no doubt by any one of his honour and financial position.

But it is said the trustees, after December 21, were guilty of some breach of duty. Why so? On the 21st they requested Junner to put the money to their names in the bank. It was only left with him pending investment; he had failed to get it, and consequently it would be prudent to have the amount deposited in the bank in their own names, a reasonable time to procure an investment by Junner having elapsed. They did not propose to leave the money under the control of Junner indefinitely. The respondent Paterson called next day to see if the new deposit receipt requested by the trustees had been obtained by Junner, but Junner had met with a serious accident and could not be seen. The Lord Ordinary and the judges of the First Division hold on the evidence that Paterson did all that could be reasonably expected towards having the money placed in their names in the bank. It appears to me they would be held accountable for the accident to Junner if any other conclusion was arrived at. I am clearly of opinion that neither during the period between July and December 19, nor between that date and the date of Junner's failure, were the respondents guilty of any act which an ordinary prudent man would have avoided.

But suppose they were a little to blame, the respondent relies on the protection clause No. 6 of the trust disposition. The truster thereby declared that, as the trust may last for a period of years, he empowers the trustees to appoint a factor under

them, and that the trustees shall not be liable for the intromissions of such factor, nor be liable for any agent who, in transacting the business of the trust, shall receive any part of the estate into his own hands. The trustees did employ an agent, namely, the firm directed by the truster himself, and they so continued the firm as their agents which came to be represented by Mr. Junner. Did not Junner receive the 3700*l.* in transacting the business of the trust, and does not the clause expressly declare that the trustees are not to be liable therefor?

It was argued, however, that their exemption from liability was excepted by the case of *Seton* v. *Dawson* (1), which it was said covered this case. But what are the facts of that case? Sums of money belonging to a trust estate were received by one of the trustees who had been directed by the others to realize and without receiving any appointment as a factor. No meeting was held for eight years after the truster's death, by which time the acting trustee had become bankrupt and a large sum was due by him to the trust estate; the trustees were held personally liable, and were not exempted from liability by the protecting clause, because their conduct amounted to crassa negligentia; they never looked after the estate for nine years, nor took any steps to ascertain what was doing with the estate that they had authorized their co-trustee to collect. So far from covering this case, *Seton* v. *Dawson* (1) is its antithesis. In this case there was no delay to make inquiries—they were made even during the Vacation, and probably led to the investment of the 800*l.* The trustees did everything after December 21 that can be suggested except that during the dangerous illness of a solicitor of the highest character they did not go to the bank, and without having the slightest suspicion practically convey to the bank that he was an untrustworthy person.

In the case of *Knox* v. *Mackinnon* (2) Lord Watson, in speaking of a similar protective clause, says: "I have no doubt that a clause in these or similar terms would afford a considerable measure of protection to trustees who have bonâ fide

(1) 4 D. 310. (2) 13 App. Cas. 753, 765.

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abstained from closely superintending the administration of the trust, or who have committed mere errors of judgment whilst acting with a single eye to the benefit of the trust. But it is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of culpa lata or gross negligence." This judgment of Lord Watson of the general law is most apt in its application to this case, which in no respect can be placed higher than an error of judgment in following the invariable practice of leaving the money paid into the factor's hands with him for investment for a reasonable time, and in not giving notice to the bank after Junner's illness. In my opinion, on the facts of this case, a decision against the trustees would be a draconic decision, and would be an additional terror to any honest and solvent person acting as a trustee. In my opinion, the judgments of the Courts of Scotland should be affirmed.

LORD SHAND. My Lords, I have also come to be of opinion that the judgments complained of should be reversed, and that the pursuers should succeed in the action, and I agree in thinking that in regard to questions such as the case raises there is no real distinction between the common law of Scotland and that of England.

If the trust deed did not contain the very wide clause of immunity which has been founded on by the defenders, it seems to me that there is really no answer on the part of the trustees to the fact that they allowed the fund which has been lost to remain in the possession and under the uncontrolled charge of their law agent from July till the end of December, 1887, without requiring that it should be placed in their own names. It appears to me to be no sufficient reason that the money was during all this time waiting an investment, if indeed the law agent truly made efforts in the meantime to invest the money; and I agree that the alleged practice in Scotland which is condemned by the learned judges of the First Division—a practice which obviously subjects the trust funds to great and unnecessary risk—cannot relieve the trustees from legal responsibility for the loss of the fund which occurred

in consequence of the fund being left entirely in the law agent's hands.

A strong argument was submitted by the respondents' counsel founded on the clause of immunity, and I confess that for a time it occurred to me that the defenders might be relieved from responsibility by the wide terms of that clause. But I have on further consideration come to the conclusion that the immunity does not extend so as to cover the acts here complained of. When the trustees by their signature to the discharge of their security armed their law agent with the power of himself receiving the amount in cash, and thus became themselves intromitters with that fund, I cannot regard it as a mere omission or neglect of management such as the indemnity clause would cover that the trustees failed for about five months to make any inquiry as to the position of the money, or to take care that it had been placed in their own names. The argument if good for a period of five months would sanction omissions or neglect for a much longer period, and I cannot give such effect to the clause—the delay having been beyond even the term of Martinmas, which was upwards of four months after the money had gone into the law agent's hands—and a term at which according to all ordinary practice an investment should have been had. Again, I agree with your Lordships who think that the part of the clause which declares that the trustees shall not be liable "for any agent who in transacting the business of this trust shall receive any part of the said estate into his hands," while it might cover a short period, it might be for a few days, or a very short time immediately before a term of Whitsunday or Martinmas when investments on heritable security are usually made, would yet cover such a time as here occurred, or even a longer period. Such neglect appears to me to be correctly characterised as of that great or gross nature known as culpa lata, to which Lord Watson and Lord Herschell both gave effect in their judgments in the cases of *Knox* v. *Mackinnon* (1) and *Rae* v. *Meek* (2) in this House.

(1) 13 App. Cas. 753.

(2) 14 App. Cas. 558.

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LORD DAVEY. My Lords, this appears to me a very plain case. The first duty of the trustees was to preserve the trust fund under their own control. Instead of doing so, they allowed it to remain under the sole control and in the sole disposition of their law agent for five months. They took it for granted that the money would be placed on deposit, but made no inquiry whether it was so; and, indeed, it appears from Mr. Paterson's evidence that he did not even suppose that the deposit would be in the names of the trustees, as it ought to have been. The Lord Ordinary was of opinion that the trustees were quite entitled to entrust the money to their law agent and factor, pending an investment being found. Lord Adam and Lord Kinnear were clearly of opinion that this was contrary to their duty, and that the reasons which were given for following such a practice were quite inadequate. I entirely agree with the learned judges in the Inner House in that opinion. The trustees might properly employ their law agent to receive the money from the mortgagees, but it was their duty to see that the money, when received, was immediately re-invested or placed on deposit in their own names and under their own control. Where I differ from the learned judges is in thinking that the ineffectual attempts made by the trustees to recover the money from the law agent did not absolve them from the consequences of their previous neglect of duty. It was, in my opinion, a clear breach of trust and culpa lata on the part of the trustees thus to abandon the performance of their primary duty, and the loss that has ensued was the direct consequence of their doing so.

My Lords, it was argued that the trustees are exempted from liability by the immunity clause to be found in the will. I think that this point is covered by the decision of the Full Bench in *Seton* v. *Dawson* (1), which has more than once been referred to with approval in this House. I agree with the opinion expressed by the Lord Justice Clerk in that case, that where trustees give a joint receipt for trust money, though it is in fact received by the hand of an agent, it is the intromission of

(1) 4 D. 310.

the trustees themselves. I also think that the immunity from liability for the intromissions of a factor or agent extends only to the acts of a factor or agent properly appointed and acting within the legitimate scope of his agency. In the present case the law agent's duty was to receive the money and at once place it in safety under the control of the trustees, and they could not properly, and did not in fact, authorize him to retain the money in his own control. If trustees think fit to delegate their duties to their law agent in a matter in which they cannot properly authorize him to act for them, or to treat him as their banker, they are not, in my opinion, protected by a clause of immunity from liability for the intromissions of factors or agents. The learned counsel for the respondents relied on some words used by Lord Watson in *Knox* v. *Mackinnon* (1); but if the whole passage in which these expressions occur is read, they do not appear to me to have any application to the present case.

My Lords, I am rather surprised to find it stated in the evidence in this case that it is the practice of Scottish solicitors to place trust funds in their own names for "behoof of the trustees," instead of placing them in the names of the trustees themselves. I am not aware that such a practice has ever been directly made the subject of judicial decision. If the case ever arises, it will have to be considered whether such a practice is consistent with the primary duty of trustees to retain the funds in safety under their own control.

I agree that the order appealed from should be reversed. A question was raised as to the rate of interest which should be allowed. There appears to be no settled rule on the subject in the Scottish Courts. I think the rate should be 3 per cent. An order should be made for payment by the surviving trustee and the representatives of the deceased trustees to the judicial factor of the sum of 3140*l.* 12*s.* 2*d.* with interest at 3 per cent. from July 15, 1887.

Lord James of Hereford. My Lords, it is with considerable hesitation that I have come to the conclusion that the

(1) 13 App. Cas. 753, 765.

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judgment of the Court below should be reversed. I also regret that I have found it necessary to arrive at that conclusion, for I feel that the trustees whom the respondents represent have acted throughout with perfect good faith, and that the neglect which they have committed in discharging the duties of the trust they undertook resulted from a desire not to display an undue want of confidence in a firm which had been regarded as bearing a high professional reputation, and composed of men of great personal honour. But those considerations cannot control the principles affecting the liability of a trustee duly to discharge the obligations arising out of his trust which he has taken upon himself, and it is only by the application of those principles that the judgment of this House should be governed.

Now, my Lords, it seems clear that the duty of the trustees in this case was to receive the trust money into their own hands, or to place it in the hands of an agent properly selected and constituted for the purpose of taking charge of it, and to see to its safety by their own control to the same extent as if it were in their own hands. I quite agree with my noble and learned friend Lord Morris that no breach of duty would be committed by trustees allowing a solicitor to receive trust money on a security being paid off, and also that, if a new security was in sight or could fairly be anticipated promptly to come into existence, the money might without breach of trust remain with the object of being so transferred, in the hands of the solicitor, that solicitor being employed for a purpose that was not completed at the time when the money was in his hands; but the solicitor so employed in the matter of a trustee's security is not the proper custodian of the trust funds except for the purposes I have mentioned.

My Lords, on the whole case I have come to the conclusion, as a matter of fact, that this money was left without proper inquiry or supervision for an undue period of time in the hands of the solicitor under conditions which enabled him fraudulently to appropriate it to his own use. I do not refer to

the facts of the case in detail, as they have been already stated by more than one of your Lordships; but, referring to them generally, I express the opinion that the period from July, 1887, till December of that year during which the money was allowed to remain in the solicitor's hands—a period of five months—was a period beyond that for which the money ought to have been allowed so to remain, and during that period the trustees appear to have regarded their solicitor as a banker and custodian of the money, and not to have treated him as a mere law agent. In that way, as it seems to me, a breach of trust has occurred in this case.

With respect to the immunity clause, I concur entirely in the observations which have been made by my noble and learned friend Lord Davey. It seems to me that that clause was intended only to protect the trustees from the fault of an agent properly constituted for the purposes of the trust; for instance, if the money had been deposited by the trustees in a bank and the banker had become insolvent or had appropriated the money, the banker being properly constituted as the holder or custodian of the money, the trustees would have been protected; but if the trustees neglect to appoint an agent at all, as if, for instance, they left the money in the hands of some mere clerk in their establishment, careless as to how it was taken care of, that person could not be regarded as such an agent that the trustees could appeal to the immunity clause for their protection.

My Lords, in the same way I think that in this case, when the trustees allowed the money to remain in the hands of a solicitor without taking care as to the proper custody of it, the protection against the acts of an agent cannot apply. Therefore, as I say, with reluctance I have come to the conclusion, with the majority of your Lordships, that the judgment of the Court below should be reversed.

Houston, Q.C., applied for an order that the fund which had been recovered and preserved by the action of the appellant should bear the costs of her solicitor.

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EARL OF HALSBURY L.C. This is a pauper case. We do not give costs in a pauper case.

Ordered, that the interlocutors appealed from be reversed; and that an order be made that the sum of 3140*l.* 12*s.* 2*d.* *with interest at* 3 *per cent. be paid by the trustees or their representatives to the judicial factor.*

Lords' Journals, March 13, 1900.

Agent for appellant: *H. Percy Becher, for Frank M. H. Young, S.S.C., Edinburgh.*

Agents for respondents: *A. & W. Beveridge, for G. M. Wood & Robertson, Edinburgh.*

[PRIVY COUNCIL.]

PALMER . . . . . DEFENDANT;

AND

MOORE . . . . . PLAINTIFF.

J. C.*
1899
Nov. 24, 28.
1900
March 2.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Joint Gold-mining Lease—Notice of Abandonment by a Joint Lessee.

Written notice by a joint holder of a gold-mining lease to his co-lessees that he is unable to contribute to the joint expenses, and that they may do as they like with it, is an abandonment of his beneficial interest therein. The subsequent working of the lease by the respondent, a co-lessee, out of his own resources is an acceptance of the abandonment:—

Held, that neither the retiring lessee nor, on his bankruptcy, his official assignee was entitled to any share of the price realized by the respondent's sale of the lease.

APPEAL from a decree of the Chief Judge in Equity (Sept. 15, 1897) which declared that Lamrock, an insolvent, had no beneficial interest in a certain gold-mining lease, and was merely a trustee for the respondent of his legal interest, if any, and that the appellant, as the official assignee of his estate, had no interest in the lease and no claim to the purchase-money agreed to be paid for it.

The question in the suit was whether the insolvent, as one of the holders of the said lease, had, under the circumstances stated in their Lordships' judgment, disclaimed or abandoned his interest therein. It was also contended that if such abandonment had been made that the respondent had refused to accept it.

The Chief Judge decided in favour of the abandonment.

Warrington, Q.C., and *J. G. Joseph*, for the appellant, contended that the legal estate in the land demised by the said gold-mining lease had vested in the insolvent as one of the

* *Present:* LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

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lessees. It remained vested in him till the date of the bankruptcy, and he continued liable up to that date to pay the stipulated rent and observe the covenants therein contained. The sequestration order made under the bankruptcy vested, by force of the local bankruptcy Act (51 Vict. No. 19), s. 10, sub-s. 1, all the bankrupt's estate and interest under the lease in the appellant as official assignee. The appellant's title rested upon this—that there had been no actual transfer made by the bankrupt. No contract had been entered into with him relieving him of his liabilities under the lease. The legal title remained, and, unless the respondent could oust it, the appellant was entitled to a share of the purchase-money for which the lease had been sold. The letters in and before January, 1894, which had been put in evidence did not upon their true construction amount to a notification of abandonment of interest. Even if they did, the respondent declined to accept it, and in March endeavoured to recover from the bankrupt his share of the working expenses. Nothing had happened to bind or transfer his legal interest. Even if an intention to abandon were proved, or an unequivocal representation of such intention, that would not, even if acted upon by the respondent, estop the bankrupt or the appellant from claiming an interest in the land, or be sufficient to constitute him a trustee for the respondent. Nor would his failure to find his share of the working expenses operate an abandonment or work an estoppel. Nothing short of a binding transaction effective to absolve him from liabilities under the lease would suffice to oust his right, except a deed of declaration of trust. In the absence of such deed, and having regard to the continued vesting of the legal title in the insolvent, the equitable doctrine as to the effect of standing by and laches did not apply: see *Norway* v. *Rowe* (1); *Hart* v. *Clarke* (2); *Prendergast* v. *Turton*. (3)

Swinfen Eady, *Q.C.*, and *C. C. Scott*, for the respondent, contended that the Chief Judge was right in holding that the

(1) (1812) 19 Ves. 144, 156, 159; 12 R. R. 157.

(2) (1854) 19 Beav. 349; and see also *Senhouse* v. *Christian*, (1795) ibid. 356, n.; 1 R. R. 300; (1854) 6 D. M. & G. 232, 248, 253, 255; (1858) 6 H. L. C. 633.

(3) (1841) 1 Y. & C. Ch. 98, and on appeal, (1843) 13 L. J. (Ch.) 268.

bankrupt had validly abandoned his interest. He was unable and refused to pay or contribute any share of the working expenses, or to perform any of his obligations as a co-lessee. Having failed to perform his part of the contract or joint adventure, he could not maintain any claim against the respondent in respect thereof, or claim any share in the price realized or in any other benefit which resulted from the respondent's expenditure. The letters are clear evidence that he abandoned and notified his abandonment of his interest, and that the respondent, acting on the faith of that abandonment, found the money for the working expenses without resorting to him for a contribution. The authorities cited on the other side shew that an interest of this kind may be abandoned. *Hart* v. *Clarke* (1) especially shews that shares can be abandoned, and, if the purpose to do so is clearly shewn, the legal right and title thereto are barred. Even laches on the part of the bankrupt in the continued assertion of his rights and in contribution to discharge of the joint obligations will affect his right to enforce any title which he may possess: see observations of Lord Chelmsford in 6 H. L. C. 655. With regard to the effect to be attributed to the notice of abandonment proved in this case and to the degree of acceptance required to make it effectual, see *Carlill* v. *Carbolic Smoke Ball Co.* (2); Bainbridge on Mines, p. 196, citing the cases referred to on the other side. See also *Forster* v. *Hale* (3) and *Adair* v. *Shaftoe*, cited in *Norway* v. *Rowe*. (4)

Warrington, Q.C., replied.

1900
March 2.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal by the official assignee of the estate of McAusland Lamrock (bankrupt) against the decree of the Chief Judge in Equity of the Supreme Court of New South Wales dated September 15, 1897.

The facts of the case may be shortly stated. A lease dated July 25, 1893, for the purpose of gold mining was granted by

(1) 19 Beav. 349; 6 D. M. & G. 232; 6 H. L. C. 633.
(2) [1893] 1 Q. B. 256, 262.
(3) (1798) 3 Ves. 696; 4 R. R. 128.
(4) 19 Ves. 156; 12 R. R. 157.

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the Crown to Maguire Lamrock and Moore (the respondent). On November 24, 1893, the Department of Mines and Agriculture served notice on the lessees to shew cause why the lease should not be cancelled for non-observance of the conditions thereof. Before receiving the notice Moore had sent a notice in writing to Lamrock (which was not produced), and in reply he received a letter from Lamrock which Moore had lost or mislaid and was unable to produce at the trial. But he stated the contents of it in the following words :—

"He (Lamrock) said he was unable to contribute anything towards the expenses of the mine, that I (Moore) and Maguire could do what we liked with it, and I distinctly remember the words he added, 'I am out of it.'"

The learned judge in the course of his judgment says that the respondent appeared to him to be as straightforward and honest a witness as he had ever seen, and he accepted the respondent's statement of the contents of the letter as true. Lamrock was not called by the appellant, and in these circumstances the contents of the letter are as well proved for the purposes of the suit as if the letter had been produced.

The respondent received another letter, dated January 4, 1894, from Lamrock in the following terms :—

"Enclosed I forward you a notice which I have received from the warden *re* our lease. The people here will not do anything in the matter, and I am not able to do anything, so that it will rest with you and Maguire. The only defence you can make will be that the work was done on the adjoining lease which stands in my name, and you thought such work was sufficient to meet the requirements of the conditions."

The respondent appeared before the warden and succeeded in avoiding the cancellation of the lease. Neither Maguire nor Lamrock appeared. The respondent thenceforward found all the money for working the mine. Lamrock never contributed a shilling towards it.

The result was that the respondent was in October, 1895, able to sell the mine to the trustees of a company for a considerable sum. By arrangement the purchasers retained 1200*l.* out of the purchase-money in consequence of a claim made by

the appellant (Lamrock having become bankrupt in March, 1894), to participate in the purchase-money. Maguire had previously been settled with by the respondent.

It should be mentioned that on March 5, 1894, a summons was issued by the warden at the instance of the respondent to recover 13*l.* for Lamrock's share of working expenses in connection with the lease from December 6, 1893, to March 3, 1894. This summons was not proceeded with in consequence of Lamrock's bankruptcy. Evidence was given by the respondent to shew that the 13*l.* was in fact Lamrock's share of expenses up to the time of his abandonment, and the summons was inaccurately filled up by the officer of the Court without his knowledge. The learned judge believed this evidence, and no reliance was placed on the issue of the summons by the appellant's counsel.

On April 22, 1897, the respondent commenced the present action against the appellant and the purchasers of the mine. By his statement of claim he alleged that Lamrock by his first letter written in December, 1893, formally disclaimed and abandoned all interest in and claim to the mine, and he claimed a declaration that at the date of the sequestration of his estate Lamrock had no beneficial interest in the lease, and was merely a trustee for the respondent of his legal interest (if any) therein, and for payment by the purchasers of the sum of 1200*l.* retained by them as already mentioned.

The learned judge held on the evidence before him that Lamrock had totally abandoned his interest in favour of his co-adventurers, and made an order in favour of the respondent.

Their Lordships agree with the decision of the learned judge and with the grounds upon which it was founded. It was argued before their Lordships by the learned counsel for the appellant that the equitable doctrine as to the effect of standing by and laches laid down in such cases as *Norway* v. *Rowe* (1), *Senhouse* v. *Christian* (2), and *Prendergast* v. *Turton* (3), had no application to a case where the claimant had an executed legal interest in the property. Their Lordships, however, do

(1) 19 Ves. 144. (2) 19 Beav. 356, n.
(3) 1 Y. & C. Ch. 98.

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not think it necessary to resort to the equitable doctrine referred to in the present case. It is a question of the effect of the evidence. Did Lamrock abandon all his beneficial interest in the lease and license Moore and Maguire to continue the adventure, if they thought fit to do so, at their own risk and for their own profit? In *Clarke* v. *Hart* (1) Lord Chelmsford, commenting on the cases of *Pickard* v. *Sears* (2) and *Freeman* v. *Cooke* (3), says: "So that I apprehend, where there is a vested right or interest in any party, the principle of law as now firmly established is, that he cannot waive or abandon that right except by acts which are equivalent to an agreement or to a licence." Their Lordships think there was sufficient evidence of such an agreement or licence in the present case. It was argued that there was no evidence of the respondent's acceptance of Lamrock's proposal. But the respondent acted on Lamrock's letter, furnished the money required for working the lease thenceforward out of his own resources, and made no claim upon Lamrock for contribution. If the respondent had made any such claim, Lamrock would have replied with justice that he had withdrawn the respondent's authority to incur expenditure on his behalf.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed, and the appellant will pay the costs of it.

Solicitors for appellant: *Ernest Salaman, Fort & Co.*
Solicitors for respondent: *Snow, Snow & Fox.*

(1) 6 H. L. C. 633, at p. 656. (2) (1837) 6 Ad. & E. 469–74.
(3) (1848) 2 Ex. 654.

[PRIVY COUNCIL.]

EDDY . . . . . PLAINTIFF;

AND

EDDY ET VIR . . . . . DEFENDANTS.

J. C.*
1899
Nov. 30; Dec. 1, 7, 8.
1900
March 24.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Law of Quebec—Purchases by Husband in Names of Wife and Daughter—Advances—Account by Mandatory before Action—Gifts by Husband to Wife—Civil Procedure Code, s. 6.

The appellant after his wife's death sued his daughter, the respondent, to recover as creditor of herself and his wife's estate moneys which he alleged that he had advanced to purchase properties in Quebec to which she was entitled either in her own right or under his wife's will:—

Held, on the evidence, that he had failed to establish his claim.

And, *quære*, whether advances made as his wife's mandatory in charge of her estate could be recovered in a suit brought before he had rendered an account of rents and moneys received in that character as well as disbursements.

Quære, also, if the advances were in the nature of gifts, whether those gifts were valid by the Quebec law or by s. 6 of the Code of Civil Procedure.

APPEAL from a decree of the above Court (Jan. 20, 1898) in three cases united for the purpose of appeal, and substantially affirming three judgments of the Superior Court for the District of Ottawa.

By the first or main action the appellant sought, under the circumstances stated in their Lordships' judgment, to recover from the respondent, his daughter, a sum of $187,454.34, for advances made by him for the purchase of three immovable properties and for disbursements, expenditures, and improvements made in connection therewith. The prayer of the declaration expressed the plaintiff's willingness to accept these properties and the improvements thereon in discharge of the

* *Present:* LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

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indebtedness, and asked for a condemnation against the defendant for the above sum, and also for a declaration that the plaintiff had a right of retention upon the said properties until the amounts advanced and expended by him were repaid.

The three properties described in the declaration are situated in the Province of Quebec—namely, the Mackay Wright Farm, the Homestead, and the Conroy Farm. The first of these was alleged to have been purchased by the respondent with the appellant's moneys paid by him as agent for or on behalf and at the request of his daughter; and the appellant also alleged that he had made improvements thereon and disbursements in connection therewith. The other two properties (the Homestead and the Conroy Farm) were alleged to have been purchased by the appellant's wife with the appellant's own moneys paid by him as agent for or on behalf and at the request of his wife, for whom he also made improvements and disbursements.

The respondent pleaded that the sums paid on account of the Mackay Wright estate were a donation pure and simple to herself for the purpose of endowing her; that the sums paid in respect of the other estates were paid by him in liquidation of liabilities contracted by him towards his late wife and as a partial division of assets between them; that any claim which he might have had was extinguished by the rents, revenues, and profits which he had received on his wife's behalf and of which he had not rendered any account.

By a subsequent amendment of her plea the respondent added that by the law of the State of Vermont, which governed the marriage of the appellant and his wife, such partial division of assets was lawful, and that a husband might benefit his wife during marriage by the purchase of real property for her, or by the expenditure of moneys thereupon, and that he could not by the same law recover from his wife or her heirs any moneys so expended.

The appellant in his answer denied all the respondent's allegations of fact, and alleged that, even if the law of Vermont were as stated in the amended plea, it could furnish no defence to plaintiff's action, inasmuch as the prohibition against consorts benefiting each other during marriage is a prohibition based

upon public policy, and applies to all consorts domiciled in the Province of Quebec, irrespective of the place where their domicil was at the time of the marriage.

The respondent followed up her pleas with a cross-action or incidental demand, by which she asked that she be declared to be the owner of the three properties in question; that the appellant be ejected therefrom, and that she be put in possession; and also that a notice of claim registered by the appellant at the Registry of Deeds against these properties be cancelled in the registrar's books. The appellant met this incidental demand by a plea setting up his pretensions as in his declaration, and asking that he be paid his advances and disbursements before being dispossessed.

The Superior Court upon the first action and upon the incidental demand, which was tried at the same time, found as a fact that the appellant paid the price and improvements of all the properties in question, but that this was done by way of irrevocable gifts to his wife and daughter respectively. The Court also held that the validity of the gifts to the appellant's wife depended upon the law of Vermont, the place of their domicil at the time of the marriage, and not upon the law of the Province of Quebec, the place of their domicil at the dates of the transactions in question, and that by the law of Vermont such gifts are permitted. The main action was in consequence dismissed, and in consequence the incidental demand was maintained, the appellant being ordered to give up possession, the registration of his lien being cancelled.

The Court of Queen's Bench held that, inasmuch as the appellant admitted that he acted as the mandatory of his wife and daughter, and inasmuch as he had the administration of these properties from the date of their acquisition, he was by law obliged to render an account of his administration before claiming his disbursements, and consequently his action was premature. For this reason the dispositif of the judgment of the Superior Court was confirmed in so far as it dismissed the appellant's action. Upon the incidental demand the judgment was modified, the Court holding that the appellant had a right of retention upon the properties for the advances which the

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proof shewed that he had made, and that he could not be dispossessed until he was repaid.

In the second of the united actions the respondent was plaintiff, and issued a process of revendication against the appellant to obtain possession of a large number of movable effects which were in the family mansion on the Homestead property. The appellant recognised the respondent's title to a certain number of these movables and offered them with the plea, but contested the action as to the remainder. The judgment of the Superior Court maintained the respondent's action for a considerable number of movable effects not tendered by the appellant's plea. The most important of these movables consisted of jewellery, and with regard to these the judgment of the Superior Court held that the law of Vermont governing the relations between the consorts permitted donations between husband and wife during the marriage, and that the law of the Province of Quebec prohibiting such donations did not apply. The judgment of the Court of Queen's Bench maintained the revendication for a different reason. Without deciding whether the rights of the consorts were to be governed by the law of the Province of Quebec or by the law of Vermont as to their capacity to confer benefits upon each other during the marriage, the Court held that the gifts of jewellery made by the appellant to his wife must be considered as moderate gifts, having regard to the circumstances, and could not constitute a prohibited gift between consorts even under the law of Quebec.

In the third of the united actions the respondent sued the appellant for an account of his administration of her movable and immovable property under a power of attorney given by her to her father on July 17, 1890, for a period of five years. These five years expired in 1895 while the other actions were still pending. The appellant resisted this action on various grounds, but principally on the ground that there was lis pendens as to the greater portion of the demand. As to the balance of plaintiff's demand for an account, the appellant produced an account with his plea. Both Courts dismissed the appellant's pleas, and condemned him to render an account of

his administration under the power of attorney in question, and in default of so doing to pay the respondent $5000.

Blake, Q.C., and *Lafleur, Q.C.*, for the appellant, contended that the judgment of the Court of Queen's Bench should be reversed. The payments made in respect of the three immovable estates were on the evidence indisputably made by the appellant. As regards the payments made on behalf of the daughter's purchase of the Mackay Wright Farm, and the validity of the gifts of jewellery to the wife as dons modiques, excepted from the prohibition of Quebec law against gifts between spouses, it was admitted that they were affected by different considerations from those which applied to the payments in respect of the wife's purchase of the Homestead and the Conroy Farm.

With regard to these latter there are two questions of law—first, as to the duty of the appellant to render an account of his disbursements and receipts before bringing his action; second, as to the payments made by him which were treated as gifts on the pleadings being invalid by the law applicable to the spouses at the time of the donations.

The judgment appealed from in effect holds that the appellant was liable to account for the rents received and profits of these two estates of his deceased wife from the date of their acquisition: see, however, art. 1425 of the Civil Code. The effect of that article is that when the wife, who is separated as to property as this wife was by the laws of Vermont under which she was married, has left the enjoyment of her estate to her husband, the latter is not accountable therefor. He is liable on demand made by his wife or on the dissolution of the marriage to account for the existing profits, not for those which have been consumed during the marriage. Art. 1425 on its true construction establishes an absolute rule of law exonerating the husband from liability to such account as is claimed by the respondent. But assuming such liability to exist, the rendering of an account did not constitute a condition precedent to the appellant's right of action to recover his advances and disbursements. There is no authority for the proposition that

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an action of this kind must be preceded by an account rendered. Reference was made to art. 120 of Code of Civil Procedure, and to *Hunt* v. *Taplin*. (1) [LORD DAVEY observed that without the account there was no constat that the appellant had any existing claim for advances made; they might have been recouped out of rents and profits.] If there was any condition precedent to the suit, it should have been availed of by a dilatory exception, and not as ground of dismissal after a prolonged investigation. Besides, there was sufficient evidence before the Court for it to have directed an account and settled what was payable by the respondent having regard to art. 1425.

The judgment appealed from should also have found on the evidence that the sums claimed as advances were not intended as gifts by the appellant to his wife. But if it should be found that such gifts were intended or made, the High Court ought to have decided whether the law of Vermont which allows those gifts applies, being the law of the parties' domicil at the date of marriage; or whether the law of Quebec which prohibits such gifts applies, being the law of domicil at the time of the transactions. It was contended that the validity of the gifts (if any) must depend upon the law of Quebec, for the property was created during the Quebec domicil, and did not exist during the Vermont domicil. By that law—see art. 1265 of the Code—they were absolutely prohibited, and were in consequence null and void. See also bk. 3, s. 2 of tit. 2 of the Code, arts.761–770. See also Pothier, vol. 4, p. 215, Traité de Donations entre Mari et Femme, arts. 34 and 35.

As to the law of Quebec governing the transaction, see Phillimore's International Law, vol. 4, p. 341; Wharton's Conflict of Laws, s. 202; Pothier's Donations, Nos. 18 and 19.

On principle and authority the law of the domicil at the time of the transaction applies. [LORD MORRIS referred to *De Nicols* v. *Curlier*, then pending in the Lords, and since decided. (2)] The law of Quebec would apply as the law of the situation of the property: see art. 1260 of the Code. The parties could not have contracted themselves out of this prohibition; their capacity to contract with each other depends on the law of

(1) (1894) 24 Sup. Ct. Rep. 36. (2) [1900] A. C. 21.

the domicil, which must be deemed to have been in their view when they contracted: see *Laviolette* v. *Martin* in Mathieu, Rapports Judiciaires Revisés de la Province de Quebec, vol. 6, p. 360; Bar's Private International Law (Gillespie's ed.), p. 419.

Hume Williams, Q.C., and *C. J. Brooke*, for the respondents, contended in the first place that the judgment appealed from was right in holding that an account rendered was a condition precedent to the appellant's suit. The appellant on his pleadings had shewn no cause of action. He had not given an account shewing that anything was due to him, nor had he pleaded under art. 120, Code of Civil Procedure, relied on by the other side. That article was considered in *Joyal* v. *Safford* (1); *Law* v. *Frothingham.* (2) Reference was also made to arts. 1425, 1713 of the Civil Code, and to *Hunt* v. *Taplin.* (3) There are many authorities as to such an account being a condition precedent to the right of suit, the appellant claiming as mandatory of his wife: see Pothier, vol. 2, p. 863, Traité du Contrat de Mandat, ss. 51–57; Pothier, vol. 7, p. 98, Traité de la Procédure Civile, 2nd pt. c. II. s. 6; Laurent, Principes de Droit Civil, vol. 27, Nos. 495 and 513; Troplong, Du Mandat, ss. 414, 428, 430; *L'Heureux* v. *Lamarche* (4); *Bouthillier* v. *Turcotte* (5); *Pepin* v. *Christin* (6); *Law* v. *Frothingham.* (7)

Secondly, they contended that on the evidence the wife must be found to have bought these properties with her own money. The payments made by the appellant's hand were neither advances nor gifts. They were only a just return to the wife of a moderate portion of the wealth which was the joint creation of her own and her husband's industry and of her capital. Assuming that these payments were gifts, it was contended that the law of Vermont, as it existed in 1846, the date of the marriage, applied. The law of Vermont governed the marriage contract in its entirety; and the Quebec

(1) (1881) 25 Low. Can. Jur. 166.
(2) 25 L. C. J. 172, 184, 186.
(3) 24 Sup. Ct. Rep. 50.
(4) (1885) 9 Legal News, 378.
(5) (1857) 1 L. C. J. 170.
(6) (1858) 3 L. C. J. 119.
(7) 25 L. C. J. 184.

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law which prohibits gifts is merely a law regulating the relation of spouses, and cannot import a new incident into a relationship already existing. Reference was made to *Laviolette* v. *Martin* (1); Dicey's Conflict of Laws, p. 648, rule 171. [LORD DAVEY. See the exception, p. 650.] Westlake's Private International Law, 3rd ed. s. 36; Bar, 2nd ed. pp. 413, 414; Revue de Droit International (1880), p. 23; Renault, Revue de Législation (1883), p. 732; Laurent, Droit Civil International, vol. 3, No. 298; Dalloz (1854), pp. 61, 62, where a judgment is reported of the Cour de Cassation in *Boyer* v. *Sutcliff*; *Bonati* v. *Welsch* (2); Loranger, Commentary on the Civil Code of Lower Canada, vol. 1, No. 82; Weiss, Droit International Privé (Le Conflit des Lois), pp. 510 et seq.; *Fisk* v. *Stevens*, a judgment of the Court of Appeal at Montreal (3); Ibid., judgment of Supreme Court. (4)

Lafleur, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE. The appellant in this case is a gentleman residing at Hull in the Province of Quebec. The respondent, who resides in the same place, is his only child. She is married to a Mr. Bessey, who is a formal party to the litigation, but the spouses are separate as regards property, and she is substantially the sole respondent. This appeal is the outcome of a group of lawsuits, the first of which was commenced by the appellant against the respondent in December, 1894. That led to a cross-action or incidental demand by the respondent. Afterwards the respondent instituted two suits against the appellant, one accompanied by an incidental or supplemental demand. All were united for the purpose of trial, and were the subject of three simultaneous decrees in the Superior Court. The same course was followed in the Court of Queen's Bench upon appeal.

The original domicil of the appellant and of his late wife Mrs. Eddy was in the State of Vermont, where they married

(1) 6 Mathieu, 360.

(2) (1861) 24 N. Y. Rep. (10 Smith) 157.

(3) (1883) 6 Legal News, 329.

(4) (1885) 8 Legal News, 42.

in the year 1846, and where their daughter, the respondent, was born in the year 1851. In the year 1854 they removed to Hull, which became their permanent place of residence and their domicil. They seemed to have had very little property at the time of their immigration, and, with the exception of some small inheritance which came to the wife from her parents, they were dependent upon their own exertions for their livelihood. They were very successful in a lumbering trade and a match trade. Both of them were very industrious and energetic, and there is evidence to shew that the wife took an important part in the joint concerns.

On August 17, 1868, Doctor and Mrs. Graham conveyed to Mrs. Eddy, the appellant's wife, a plot of land in Hull for the sum of $11,000, which Mrs. Eddy bound herself to pay by instalments. The appellant was party to the conveyance, and formally authorized his wife to effect it. In the year 1881 a formal acknowledgment was made by Doctor and Mrs. Graham of the payment by Mrs. Eddy of all the instalments. This property is called the Homestead. The Eddy family resided upon it, and considerable sums of money were spent in buildings and improvements.

In the year 1873 the appellant became embarrassed for money, and with a trifling exception he made a conveyance of all his property for the benefit of his creditors. In 1876 he became bankrupt, and was discharged on compromising with his creditors for twenty cents in the dollar. After that his concerns became prosperous again. A company was founded on his business in which he holds the greater number of shares, yielding a large income.

On September 7, 1880, a conveyance was effected of another piece of land called Mackay Wright Farm to the respondent for the sum of $17,000. The appellant was not a formal party to the transaction, but it is agreed that the purchase-money was paid by him.

In the year 1883 further purchases of land were made by Mrs. Eddy for sums amounting to about $10,000. The forms of the transactions were similar to those by which the Homestead was purchased, except that in some of the

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instruments Mrs. Eddy was described as being separated from her husband in property according to the laws of Vermont, where their marriage took place. The land was used for farming purposes. Mrs. Eddy remained the ostensible owner of it during her life. It is called the Conroy Farm.

On September 10, 1893, Mrs. Eddy died. By her will made seven years earlier she gave all her property to the respondent, and appointed her to be executrix. The will was proved by the appellant. Accounts of the estate were duly filed, and the respondent formally accepted the succession by authorization of her husband on February 21, 1894. In June, 1894, the appellant contracted a second marriage, after which dissensions broke out in the family, and the appellant made the claims which are now under consideration.

The appellant does not claim ownership in any of the purchased properties. He presents himself as a simple creditor of his daughter and of his wife's estate. His case is that he advanced money to his wife and daughter for the purchase of their respective properties, and for improvements and other expenses in respect of them; and that nothing having been repaid to him, he is now entitled to enforce the debts. He claims against his daughter $45,000 and upwards for the Mackay Wright Farm; and against his wife's estate upwards of $122,000 for the Homestead, and of $21,000 for the Conroy Farm. His total demand is upwards of $187,000.

As regards the direct claim against her on account of the Mackay Wright Farm, the case made by the respondent is that the purchase was made entirely on the initiative of the appellant, who was then engaged in large commercial concerns, and that it was made by way of advancement to her, who had then no property of her own, but was living with her parents and was supported by them. She shewed further that the appellant managed the property and received its produce from the time of the purchase onwards, and that on July 17, 1890, the appellant took from her a general power of management over all her property and in special over the Mackay Wright Farm. This power was made irrevocable for a term of five years, and it is the basis of one of the actions instituted by the respondent.

As regards Mrs. Eddy's estate there are numerous defences. The pleadings are very voluminous, and, owing to the multiplication of claims, cross-claims, incidental demands and defences, not always easy to follow. But the following passages, taken from the plea and the incidental demand of the respondent, disclose the matters which have after full argument appeared to their Lordships the most important for the decision of this case:—

"That at the time of the marriage of the said plaintiff and the said Zaida Diana Arnold he, plaintiff, was poor and without means and his said wife had considerable means of her own, which he received from her, and also other moneys during their marriage, and by the joint industry of the said consorts during over twenty years, they had amassed a considerable fortune. That the said Dame Zaida Diana Arnold had always worked and assisted her husband and contributed equally with him to their earnings. That afterwards the said plaintiff, having gone into business and engaged in commercial ventures, and incurred risks and liabilities of large amounts, such an application of the monies of the said Dame Zaida Diana Arnold, to wit, in the purchase of said properties and the building of said house and other improvements on the properties in the city of Hull, was made, by the consent of both consorts, in order to secure to the said Dame Arnold the share to which she was justly entitled in their joint property."

The next paragraph applies only to the Homestead:—

"That shortly after the said block in the city of Hull was purchased and the said house was built, the plaintiff became insolvent; but that he always treated the said house and property as belonging purely and simply to his wife, denying that he had any claim whatever against her in connection therewith, and acknowledging that she had still large claims against him."

Then, speaking of the Conroy Farm, the respondent says that it was "acquired by the said Dame Zaida Diana Arnold with her own monies, derived from her own earnings and property, and bequests made to her, and from the revenues of her estate, without any idea of returning the said properties or

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their equivalent: and any sums paid by the said plaintiff for the purchase of said property, or for taxes, or interest, or for improvements for or in connection therewith, were so paid by him as being monies of the said Dame Zaida Diana Arnold, and in liquidation of liabilities contracted by him to her, and as and for a partial division of assets between them."

During the pendency of the case the respondent put in an amended plea in which she suggested that by the law of Vermont there may be a partial division of assets between husband and wife, and that a husband may also confer benefits on his wife by gifts which the law of Quebec forbids.

On January 12, 1897, Gill J., who tried the case, passed his decrees. He held it to be proved that the appellant had paid for the various lands and improvements by way of irrevocable gift to his wife and daughter. He accordingly dismissed the appellant's original action and gave relief to the respondent on her incidental demand by declaring her to be proprietor and entitled to possession. In the respondent's suit for revendication of movables he gave her a decree for a number of articles described in a schedule, the total value being $5702. In the respondent's suit for account under the power of attorney granted by her to the appellant he ordered the appellant to account, or in default to pay $5000.

It would seem that the case must have been argued at the trial on the footing that the respondent alleged that the appellant's payments were by way of gift, not only as regards herself and the Mackay Wright Farm, but as regards her mother and the other properties. That opened a question of great difficulty in point of law—namely, the question whether such a gift could legally take effect between the appellant and his wife. By the law of Quebec it could not. By the law of Vermont, as found by the learned judge, it could. The learned judge then, addressing himself to the question which law is to prevail, decides that it must be the law of Vermont.

On appeal the Court of Queen's Bench upheld the decisions of the Superior Court in the two suits commenced by the respondent. In the appellant's suit it affirmed the decision of the Court below so far as it dismissed the suit; but on that

part of the decree which granted the respondent's incidental demand the Court of Queen's Bench made a variation which is the subject of a still pending appeal by the respondent to the Supreme Court of Canada. The effect of the decree as it stands on this part of the case is to declare the title of the respondent to the three properties in question, and to cancel an entry which the appellant had caused to be made in the public register of his claim as a charge against the properties. But the decree does not give possession to the respondent.

The view which the Queen's Bench take of the law applicable to the case is materially different from that of Gill J. They decline to decide whether the rights of husband and wife are governed by the law of Quebec or by that of Vermont. That still leaves them free to sustain the Superior Court's decree in the respondent's suit for movables, because the law most favourable to the appellant, namely, the law of Quebec, does not forbid dons modiques, which they consider the articles in question to be.

The Court's decision to dismiss the suit is arrived at by an entirely different road. Substantially their position is as follows: The appellant claims that his expenditure in respect of the properties in question was made by him as the mandatory of his wife and daughter, and it is common ground that he has received income from the property. He contends that a gift to his wife is illegal, but he cannot have given more than the excess of his expenditure over his receipts. Whether that amounts to much or to little, such as the law would allow, or to anything at all, cannot be told until he has rendered an account. If there has been no gift, or a permissible one, what need to examine the difficult question of international law? It seemed to the learned judges that this obstacle lay upon the threshold of the appellant's suit. The Court could not, they said, do its duty unless he supplied the means of overcoming this preliminary obstacle; and they applied the maxim that a mandatory must render an account before bringing an action for reimbursement. That they say is the sole ground upon which the Court dismisses the action. On the same ground, that the appellant is a mandatory, and that under art. 1713 of

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the Civil Code a mandatory is entitled to retain the thing committed to him until his charges are paid, the Court refuses to affirm the respondent's right to immediate possession of the property.

The appellant has appealed against the decrees as a whole, and the case lodged by him challenges the whole judgment of the Court below. At the bar, however, it has been admitted that he cannot maintain his direct claim against the respondent in connection with the Mackay Wright purchase. Nor has any substantial reason been assigned for impeaching the decree in the respondent's second suit under the power of attorney. The question as to the respondent's right to recover jewels and like personal matters is reduced to a very narrow compass. Both Courts have held that they were given to Mrs. Eddy. Both have held that Mrs. Eddy was not legally incapacitated from receiving them. The Superior Court held so because it applied the law of Vermont. The Court of Queen's Bench held so because, applying the law of Quebec, the gifts are modest ones such as that law does not interfere with, when it is considered that they are referable to a married life of more than forty years' duration, and attended for a large portion of the time by great prosperity. Their Lordships have heard no reason why they should dissent from this view of the Court of Queen's Bench; and the subject is one on which they would require strong and clear reasons for dissenting from those who dwell in the society which the law affects.

There remain the questions raised in the appellant's original suit. The greater part of the argument addressed to their Lordships on the part of the appellant consisted of very vigorous attacks on the position of the Court of Queen's Bench that the appellant's suit must fail because he had not previously rendered an account, and on the position of the Superior Court that the legality of a gift from the appellant to his wife is to be tested by the law of Vermont.

As regards the necessity for a preliminary account, their Lordships have found much difficulty in deducing from the authorities cited by the respondent's counsel any such stringent and peremptory rule as they contend for; but in the view that

they have ultimately taken of the case they do not find it necessary to decide this question.

As regards the question which of the two national laws is applicable to the case, it is necessary to distinguish between different parts of the case and to see precisely what is meant by saying that it is, or is not, governed by the law of Vermont. There is no dispute that when the Eddys married the ordinary rules relating to husband and wife in Vermont attached to them whereby they were separate in property. Nor is it contended that when they acquired a domicil in Quebec that incident of their marriage contract was altered. The appellant's suit is not founded on the principle that there was community of goods between himself and his wife. That, indeed, would be fatal to his case, which rests throughout on the view that he and his wife were separate, and that she borrowed money of him in order to purchase property for herself. So far it is clear that the law of Vermont applies. The question is whether it applies to gifts between husband and wife domiciled in Quebec. The Quebec law interposes no difficulty as regards separation or community of goods. On these points it leaves parties contemplating marriage free to make what contracts they think fit, and as they may make contracts in Quebec they may equally bring into Quebec ready-made contracts and leave them untouched. As regards gifts between husband and wife, the parties are not left to freedom of contract. They are positively prohibited from making such gifts. And, considering the nature of the prohibition and the very stringent terms of s. 6 of the Civil Code, the view of the Superior Court presents grave difficulties.

But before discussing the validity of a gift there must be a gift to raise the question. On this point, after the greater part of the legal argument had been presented in the opening, questions were asked which disclosed that, except with respect to the Mackay Wright purchase, no gift was alleged upon the pleadings. Neither the appellant nor the respondent states a gift from the husband to the wife, nor is such a thing referred to till a late period in the pleadings, when an allegation of the legality of such a gift in Vermont was introduced. But for

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that, there would have been no question of international law at all.

The real question is whether, taking the appellant's case as he has presented it, there is any sufficient evidence to support it. He has to account for the fact that, according to the documents, lands were purchased and paid for by his wife and daughter, that on the death of his wife his daughter succeeded to the purchases by the wife, and that, having regard to the circumstances of the family, the enjoyment of the properties has been consistent with the ownership of the ostensible purchasers. What he shews is that in point of fact all payments for these properties were made by means of his cheques, given either as an individual or described as manager of the business which he and his wife created. That circumstance, however, does not prove that he was the sole owner of the money so spent. It is consistent with his being the owner, but it is also consistent with the respondent's suggestions that he had in his hands money belonging to his wife, or that the money was being earned by the two, and that the payments made by the husband for the property conveyed to the wife were a mode of securing to her a share in the joint earnings. Their businesses, or branches of business, were jointly worked. The appellant was the head and manager of all, and so, on whatever footing payments were made, they would equally come through his hands. There are no accounts or memoranda to shew on what footing the payments were made. He suggests that his accounts were burnt in an accidental fire; but there is no evidence to shew that any existed to support his present case.

The appellant made no claim as creditor of wife or daughter until after the death of his wife. She must have been the only person except himself who knew the precise truth of the matter; for it is clear that the daughter took no part in the transactions. It was open to him to select the character in which he would make his claim, and he selected that of creditor. He asserts that his wife, having no property of her own or very little, conceived the idea of purchasing land by means of loans from him to be repaid with interest, and of erecting buildings on the land by the same means; and that

through a series of years he made advances for this purpose, though never taking any receipt or making any entry or memorandum in his books to shew the nature of his expenditure. He tells the same story with respect to his daughter. It is obvious that the character of donor would not suit his case as regards the daughter's purchase, for a gift to her was not only a very natural and probable course for a father to take towards his only child, but was also without legal objection; so that if that property was given he could not recover it. Anyhow, he tells the same story with regard to all three purchases. There is no documentary evidence of it except the payments made by the appellant's hand, and, inasmuch as those are consistent with other explanations, there is no unambiguous evidence on the point unless we are to take the statements of the appellant in his pleadings as evidence. In these circumstances it becomes very important to see how the appellant has treated these properties before the present quarrel sprang up.

In July, 1873, he conveyed for the benefit of his creditors all his estate movable and immovable which is particularly mentioned in the schedules annexed to the deed of conveyance. Those schedules contain no mention of the Homestead, which had then been purchased and was the family residence.

Afterwards in December, 1876, the appellant, having become insolvent, put in upon oath a statement of his liabilities and assets. In a previous statement made by him for his creditors in June, 1873, he had entered his wife as a creditor for $1504. In the statement of 1876 he enters his wife as a creditor for $1003, and he does not enter among his assets any of that money which he now alleges was due from her. These entries of debt to the wife and the omission to enter the debt due from her are not explained by the appellant, inconsistent as they are with his present claim. They are consistent with the supposition that he had made his payments for the Homestead out of money in his hands belonging to his wife, or out of money agreed to be due to her for her earnings in the joint business, or with the supposition that he had still money in his hands which was hers by right. But if his present claim be a true one, he must have been deceiving his creditors at that time.

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After the death of Mrs. Eddy a statement of her succession was made for the Collector of Revenue. This statement, though made in form by the respondent, was in effect made under the instructions of the appellant and of Mr. Gormully, his counsel. It shews that the Homestead and the Conroy Farm were property devised by Mrs. Eddy. It shews, also, that there were debts due from Mrs. Eddy amounting to $800, but it does not mention any debt due from her to her husband. This statement is dated November 20, 1893. It is clear that up to that date the appellant took the same view of his legal rights against his wife as he did when the negotiations with his creditors and the accounts of his bankruptcy were pending.

In December, 1894, he filed his declaration in this action, which gives a new version of the story wholly irreconcilable with anything that had gone before. In effect he contradicts all the formal documents and all his previous statements. To maintain such a case would require very cogent evidence, and there is no evidence except the appellant's own statements in his pleadings.

It is true that in the Superior Court the issue became shifted or confused in some way, and the defence applicable to the Mackay Wright Farm was treated as if it applied to the two other properties. The appellant has willingly enough accepted that change of issue, even though it involved the abandonment of his case so far as concerns the Mackay Wright Farm, because it gives him some firmer ground to stand upon for claiming the other two properties. But the respondent has never accepted the change, except to the extent of arguing provisionally that if there was a gift it was valid. She has throughout insisted on the grounds taken in her plea, as is shewn by her factum lodged in the appeal to the Queen's Bench and by her response to the present appeal. She is not bound to shew what is the true explanation of this long family history from 1868 to 1894. It is sufficient for her to say that the appellant's explanation cannot be the true one. Their Lordships hold, not only that it is devoid of proof, but that of the various explanations which may be suggested it is the least probable in itself and the most opposed to such evidence as is attainable.

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The result is that this appeal fails at all points. Their Lordships will humbly advise Her Majesty to dismiss it, and they direct that the appellant shall pay the costs. In the month of June last the appellant moved to expedite the hearing of the appeal, and in July the respondent made a like motion. The available time was filled with other appeals, and no order was made on either motion. Their Lordships do not think fit now to make any order as to the costs of either.

Solicitors for appellant: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitors for respondents: *Norton, Rose, Norton & Co.*

[PRIVY COUNCIL.]

J. C.* 1899 Nov. 21. 1900 March 24.

NATIONAL TELEPHONE COMPANY, LIMITED . . . . . } PLAINTIFFS;

AND

THE CONSTABLES OF ST. PETER PORT . . . . . } DEFENDANTS.

ON APPEAL FROM THE ROYAL COURT OF GUERNSEY.

Law of Guernsey—Illegal Stretching of Telephone Wires across Public Streets—Powers of Local Authority—Removal of Wires.

In a suit by a telephone company against the local authority to recover damages for cutting down and removing telephone wires stretched across a public street, it appeared that the company was not authorized by statute so to place their wires:—

Held, that the action failed. The removal was within the legal powers of the defendants, and there was no allegation of any unnecessary damage having been caused by the cutting.

APPEAL from a decree of the Full Court of Appeal (June 15, 1897) affirming a decree of the Royal Court (March 22, 1897), which dismissed the appellants' action for 250*l.* damages for

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, LORD DAVEY, LORD BRAMPTON, and LORD ROBERTSON.

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the defendants' acts in cutting in June, 1896, certain telephone wires which they had stretched across La Grande Rue in the parish of St. Peter Port without obtaining the defendants' permission and contrary to their prohibition.

The appellants alleged that this cutting of their wires was "mal-à-propos et contre droit."

The respondents pleaded the following exceptions :—

"(1.) That by a certain indenture made between the Postmaster-General and the appellants, and dated the 25th of March, 1896, the right of the appellants to carry on their business was restricted to specified areas, of which in June, 1896, Guernsey was not one.

"(2.) That the appellants' memorandum of association gave them no power to carry on their business in Guernsey.

"(3.) That the appellants had no right by custom to carry wires over the said street without the permission of the respondents, who had expressly refused the same."

Asquith, Q.C., *Lankester*, and *Roskill*, for the appellants, contended that they were the owners in possession of the telephone wires, and that the respondents had no title to interfere with or disturb such possession. The allegations made in the respondents' first and second exceptions, even if true in fact, are immaterial, and do not affect the appellants' claim. It was not incumbent upon the appellants to obtain the respondents' permission before stretching the wires across the public streets. The respondents have not either by the custom of the island or by the Ordonnance Générale relative aux Routes, Rues et Chemins, 1840 (see vol. ii. p. 509, of vol. ii. of the Recueil d'Ordonnances), any right to interfere as they did with the wires or any of them. Sect. 26 of the Ordonnance did not apply to telephone wires : see *Wandsworth Board of Works* v. *United Telephone Co.* (1), in which it was held that a telephone company did not fall within the phrase "the company" used in the Telegraph Act, 1863, and therefore was not forbidden to erect its wires across a street without consent of the street authorities. See also Dictionnaire de la Coutume de Normandie,

(1) (1884) 13 Q. B. D. 904.

by Houard (1782, Rouen), vol. iv. p. 500; art. 1, p. 506, "Voierie," and vol. i. p. 229, "Chemin"; *De Carteret* v. *Baudains* (1), where it is said that Jersey is governed by its own law, which was founded on the old customs of Normandy much modified both by usage and legislation in the island. The common law of Guernsey is that of Normandy before the Channel Islands were disjoined therefrom and became British. The above citations shew that the common law of England and Normandy is the same with regard to the rights of owners of property to erect and maintain wires and other objects over their properties, and that the roads are only vested in local authorities for strict and limited purposes, the ownership of the soil remaining in the former owners before the roads were made. See also Commentaires sur la Coutume de Normandie, Bérault (Rouen, 1776), vol. ii. p. 716, art. 608, "Des servitudes," and *Mayor of Tunbridge Wells* v. *Baird.* (2)

Rawlinson, Q.C., and *Younger*, for the respondents, contended that it had not been established that the cutting of the wires in manner complained of was a wrongful act, and that if it were it had not been established by the evidence that the appellants had sustained any damage therefrom. By the custom of the island, as found to exist by both the Courts below, the appellants had no right to stretch their wires across the public streets without the permission of the respondents, as trustees or guardians thereof and of the public safety of the parish. Sect. 4 of the Telegraph Act of 1892 entitles the respondents to require that the appellants should remove those wires. As the appellants failed to comply with that request, the respondents were entitled by the custom of the island and the said section to remove them, and the appellants had no right to complain of their so doing. The French authorities cited on the other side apply to highways rather than to streets, and upon a modern matter of this kind there is no reason for falling back upon Norman authorities which had ceased to apply in the island for nearly seven centuries. Assuming that the respondents' permission was necessary to authorize the appellants' action, they were entitled to take the law into their own

(1) (1886) 11 App. Cas. 219. (2) [1896] A. C. 434.

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hands: see *Bagshaw* v. *Buxton Local Board of Heath* (1), which had been followed in later cases. There was no evidence that the wires were not dangerous. Reference was also made to *Doolan* v. *Midland Ry. Co.* (2)

Asquith, Q.C., replied.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal from an order of the Court of Judgments in the island of Guernsey, dated June 15, 1897, affirming a previous order of the Royal Court. The suit was instituted by the representative of the appellant company against the respondents, the Constables of St. Peter Port. The cause of action is thus described in the register of the Royal Court:—

"La cause de Monsieur W. E. L. Gaine agissant pour la Compagnie dite 'The National Telephone Company, Limited' (laquelle dite Compagnie a le droit en vertu d'une Licence en date du 29 Novembre 1884 octroyée par le Ministre des Postes anglicé 'the Postmaster-General' en conformité avec les pouvoirs qui lui sont attribués par les Actes de Parlement rélatifs aux Télégraphes, 1863–92, pour exploiter et de se servir du système télégraphique dont les moyens de transmission et de réception seront des téléphones) contre Messieurs Edward Valpied et Robert Henry Payne, Connétables de la Ville et Paroisse de Saint Pierre Port, à leur payer 250*l.* stg. argent au Cours d'Angleterre pour avoir les dits Connétables le 3 Juin ou environ mal-à-propos et contre droit coupé ou fait couper les fils téléphoniques appartenant à la dite Compagnie que la dite Compagnie a tendu à travers la route publique dite 'La Grande Rue' en la paroisse de St. Pierre Port. Et leur payer leurs dépens: a été inscrite sur le rôle des causes à plaider."

The respondents pleaded three exceptions to the appellants' claim:—

"1° Que la dite licence en date du 29 Novembre 1884 ayant été modifiée par un accord entre la dite Compagnie et le dit Ministre des Postes en date du 25 Mars 1896 l'article 4, lequel porte qu'à partir du 4 Avril 1896 la dite Compagnie cessera

(1) (1875) 1 Ch. D. 220. (2) 2 App. Cas. 792.

de faire des affaires téléphoniques ailleurs qu'en dedans de 'Exchange Areas' et que la dite licence et la permission, les pouvoirs et autorités par elle conférés, sont, à partir du dit jour, limités aux dits 'Exchange Areas' et n'auront plus d'effet et opération qu'en dedans des dits 'Exchange Areas,' et la dite Ile de Guernesey n'ayant pas été un des dits 'Exchange Areas' le 3 Juin 1896 ou environ, aucun droit qui a pu être accordé à la dite Compagnie par la dite licence par rapport à la dite Ile de Guernesey n'existe plus à la dite dernière date: 2° Que la dite Compagnie n'a été constituée d'après son Acte de Société ou anglicé 'Memorandum of Association' que pour entreprendre et conduire des affaires téléphoniques dans le Royaume Uni de la Grande Bretagne et que par conséquent elle n'a aucun droit légal d'étendre ses opérations jusqu'à l'Ile de Guernesey laquelle est en dehors du dit Royaume Uni. 3° Que d'après la coutume la dite Compagnie n'avait aucun droit de tendre des fils à travers la dite rue publique sans la permission des dits Connétables de la dite paroisse, comme dépositaires ou gardiens des rues publiques et de la sûreté publique dans la paroisse, et que les dits Connétables avaient expressément défendu à la dite Compagnie de tendre des fils à travers les rues publiques de la dite paroisse."

These exceptions were allowed by the Royal Court, and the action was rejected with costs, and this judgment was affirmed by the Court of Judgments.

The appellants before their Lordships did not contest the first and second exceptions. It is admitted that at the date of the action the Telegraph Acts of the United Kingdom did not enable the Postmaster-General to confer upon the company the privileges contained in his licence within the island of Guernsey, and his licence does not in fact do so, the island not being an "Exchange Area." It was also admitted that the company was not then authorized by its memorandum of association to carry on business within the island. The latter point does not appear to their Lordships to be material. If the business was ultra vires of the company, that is a question for the shareholders or for the Attorney-General, and not one which the Constables had any interest to raise.

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The appellants, however, deny that the Constables have by law any such power as that claimed by the third exception, and they further say that, if there be any rule of law which requires their previous consent to be obtained to the stretching of wires across the streets, it does not follow that the Constables had a right to take the law into their own hands and of their own motion cut the wires, for which proceedings (they say) a special power must be shewn.

Their Lordships think that there are not sufficient materials before them to enable them to say that the Constables have not such a power as is claimed and is declared by the Guernsey Court to be vested in them, namely, to prohibit the wires being stretched across the public streets and to remove them if placed there without their consent. It must be admitted that such a power is not expressly conferred on the Constables by the "Ordonnance Générale relative aux routes, rues et chemins" of 1840, and is not to be found in that document unless it be contained in the general power of "surveillance" of the highways. But their Lordships do not think it necessary, in the view which they take of the case, to express any decided opinion on this point.

It is important to observe what is the substance, or in the language of English pleaders the gist, of the action. The complainants allege a statutory right to place their wires across the street, and complain of the interference by the respondents with their statutory right. The defence pleaded by the first exception is that the appellants have no such right. If so, the action fails. It is true that the declaration avers that the wires were "cut," but there is no allegation of unnecessary damage to the wires in removing them, and the action does not appear to be so framed as to enable the complainant to recover for such unnecessary damage (if any). Their Lordships think that an action will not lie against the present respondents for the mere removal of the appellants' goods from a public place in which they had no right to place them. That appears to be the case in these pleadings, for no other right but the alleged statutory right is averred. The appellants have not brought before their Lordships any rule or practice in the Guernsey

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system of pleading which would justify them in putting on these pleadings any interpretation different from that which the Court seems to have adopted.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellants will pay the costs of it.

Solicitor for appellants: *W. E. L. Gaine.*
Solicitors for respondents: *Nisbet, Daw & Nisbet.*

[PRIVY COUNCIL.]

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Feb. 28; *April* 6.

SIMMS AND OTHERS . . . . . APPELLANTS;

AND

THE REGISTRAR OF PROBATES . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

South Australian Succession Duties Act, 1893, *ss.* 16, 27—*Construction—Covenant to Pay—"With Intent to evade Payment of Duty."*

The deceased covenanted to pay 200,000*l.* to his children with interest at 1½ per cent. per annum, the debt being payable at call. He regularly paid the interest, but no portion of the principal:—

Held, that this covenant, in the absence of evidence to the contrary, conferred on the children complete ownership of the debt, and was a non-testamentary disposition of property within the meaning of the South Australian Succession Duties Act, 1893, s. 16, not subject to duty under s. 17, as the testator died more than three months thereafter:

Held, further, that it was not chargeable with double duty under s. 27, as made "with intent to evade the payment of duty hereunder" in the absence of evidence of some device or contrivance for that purpose.

APPEAL from an order of the Full Court (Dec. 20, 1898) reversing by a majority an order of Way C.J. (May 23, 1898) made in the matter of "The Succession Duties Act, 1893," No. 567 of 1893.

The question at issue was whether the deed executed on

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January 10, 1896, in this case by the deceased under the circumstances stated in the judgment of their Lordships should be held to have been made "with intent to evade payment of duty" under the Act, and penalised with double duty (amounting to 24,376*l.*) on that account. It arose under s. 27, which is set out in the judgment.

A summons under s. 27, sub-s. 2, of the above Act was taken out by the Registrar of Probates, on behalf of the Crown, calling upon the appellants (the covenantees) to shew cause why declarations should not be made that the debt or debts incurred by William Knox Simms under the deed-poll was or were so incurred with intent to evade the payment of duty under the Act, and that double duty was payable in respect of the property accruing under the covenants in the deed-poll, and for an order on the appellants to file a statement and pay duty accordingly.

Affidavits were read on behalf of the registrar (verifying the facts, but not alleging that the deed-poll did not represent the true arrangement between the parties), and Way C.J., without calling on the other side, gave judgment for the appellants, ordering the summons to be dismissed. The appellants were entitled but were not called upon to give evidence.

On appeal by the registrar, Way C.J. adhered to his former opinion. Boucaut and Bundey JJ., on the contrary, held that, taking the facts as they stand, the deed-poll of January 10, 1896, must be deemed to have been made with an intention to evade payment of duty under the Act, and were prepared at once to make a declaration and order for payment of double duty as asked for by the summons. It was, however, pointed out that the appellants had not waived the right to give evidence, and ultimately the order appealed from was set aside with costs, and the summons was ordered to stand over to be dealt with on the merits, "the majority of the Court holding that the registrar has made out a primâ facie case to be answered."

Upon the meaning of the term evasion as distinct from avoidance, the following cases were cited in the ruling judgments of the Court below: *Yorkshire Wagon Co.* v.

McClure (1); *Attorney-General* v. *Beech* (2); *Harding* v. *Headington*. (3)

Haldane, Q.C., *Lawson Walton, Q.C.*, and *V. Hawkins*, for the appellants, contended that the judgment of the Chief Justice was right, and that of the majority of the Full Court wrong. The deed of January 10, 1896, was unimpeached. No evidence was given or producible to shew that it was not a bonâ fide operative deed according to its terms. [THE LORD CHANCELLOR. The whole question is whether the transaction was colourable or real.] There was no evidence or allegation that there was any secret or other engagement, trust, or arrangement not in accordance with or contradicting its terms. The registrar had not made out a primâ facie case or any case for relief under s. 27, sub-s. 2, of the Act. If W. K. Simms, the covenantor, had died within three months of executing the deed, duty would have been payable. As he lived for more than three months afterwards, it was not payable. If one of his motives for executing it was to avoid liability to duty, that was within his rights. He had a right to avoid liability, but not to incur liability and then evade discharging it. No duty was ever payable in respect of the deed in the events which had happened, and, therefore, there was no payment which could be or was evaded.

Warmington, Q.C., and *Danckwerts, Q.C.*, for the respondent, contended that the deed by which debt was incurred in this case must, under s. 27, be deemed to have been a deed of gift under s. 16, and that, having regard to the terms of the latter section, the circumstances of the case, unless answered by the appellants, constituted primâ facie proof that W. K. Simms executed the deed with intent to evade payment of duty under the Act. There was sufficient evidence to render s. 27, sub-s. 1, applicable. The transaction was not a real transfer of property; it in terms created indebtedness, which left the covenantor in full possession and control of his estate, and no portion of the principal was ever paid during his life. It should be presumed

(1) (1882) 21 Ch. D. 309, 318.
(2) [1898] 2 Q. B. 147; S. C. 67 L. J. 584, 591.
(3) (1874) L. R. 9 Q. B. 157.

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to be, in the absence of evidence to the contrary, a colourable transaction, never intended to take effect till after the covenantor's death. It was a debt voluntarily undertaken; the parties could never have contemplated its enforcement during the life of the debtor, and the fair inference was that it was testamentary in intention, the particular form of the transaction being adopted with intent to evade payment of the duty imposed by the Act. Reference was made to *Attorney-General* v. *Trimmer*. (1); *Attorney-General* v. *Noyes*. (2)

Haldane, Q.C., replied.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. In this appeal the question is what amount of succession duty is payable to the respondent representing the Crown from the estate of William Knox Simms. He died on December 25, 1897, domiciled in South Australia. The appellants are entitled under his will, and they claim that duty is not payable in respect of a sum of 200,000*l*., which the testator had covenanted to pay in the year 1896. The respondent contends that the testator's covenant was made with intent to evade the payment of duty, and that under the provisions of the Succession Duties Act, 1893, double duty is chargeable on this sum. The material facts on which the discussion has turned are as follows.

On September 26, 1892, the testator, who had been a brewer in Adelaide, but had retired from business, made his will. After giving some specific properties and a life annuity of 2000*l*. to his wife, he gave his residuary estate in trust for his children in equal shares. As to the shares of the daughters, he gave the income to the separate use of each for life. If she did not leave issue, she had power to dispose of her share by will; and if she did leave issue, they took the share. Further trusts were declared in favour of husbands or wives of all his children on failure of the prior trusts.

The present Succession Duties Act received the Royal Assent on October 25, 1893. It superseded the previous Act of 1876, and it imposed much heavier rates of duty—amounting for an

(1) (1883) 17 South Australian L. R. 27. (2) (1881) 8 Q. B. D. 125.

estate so large as that of the testator to an increase of 8 per cent. When it passed and up to the time of the testator's death there were living six children of his—three sons and three married daughters, two of whom had living issue.

On January 10, 1896, the testator executed a deed-poll in the following terms :—

"Know all men by these presents that in consideration of natural love and affection, I, William Knox Simms, of Adelaide, in the province of South Australia, gentleman, do hereby covenant, promise, and agree, jointly and severally with my children Alfred Simms, Harry Simms, Edward Simms, Louie Colley, Clara Jane Bonnin, and Eleanor Varley, that I will pay to them the sum of 200,000*l.*, such sum to be divided between them in equal shares. And I further covenant and agree, jointly and severally with my said children, that until the said sum of money be paid and divided between them as aforesaid, or suitably invested on their behalf, I will pay to them interest thereon at the rate paid by the Associated Banks in Adelaide on deposits at three months, provided such interest shall not be less than at the rate of 1*l.* 10*s.* per centum per annum, such payments to be paid and payable quarterly in advance, the first of such payments to become due and payable on the 1st day of January, 1896. And I declare that as to the interest accruing due to my said children until the said principal sums be otherwise invested I will pay to my sons as they may direct, but to my daughters personally or into their respective banking accounts and to and for their sole and separate use, free from the control of their respective husbands. And I hereby declare that I will pay the principal sums due to such of my daughters as have issue living into the hands of my said sons, Alfred Simms and Edward Simms, and my son-in-law, Paul Frederick Bonnin, as trustees on their behalf, to invest the same for such daughters for life, and pay the annual income thereof to them, and thereafter to divide the same between their respective children per stirpes and not per capita. And I hereby acknowledge and declare that I am indebted to my said children in the said sum of 200,000*l.*, such principal sum to be utterly irrespective of any sum I may leave to them under my will, and not to

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be brought into hotchpot with my testamentary estate. In witness," &c.

When the testator died, no part of the 200,000*l.* was paid, but interest thereon at 1½ per cent. was regularly paid by him in advance to the six children. It is shewn that he received about 3 per cent. on his investments. As under his covenant he paid interest one quarter in advance the debt was not payable strictly on demand, but it was payable at call varying in time from three months down to a day. The Chief Justice says that 1½ per cent. is a very fair rate of interest for money at call of three months.

On the testator's death his executors claimed to treat the whole sum as a debt, and to deduct it from the estate for the purpose of ascertaining the amount of duty. On the part of the Crown it is not disputed that, independently of the express provisions of the Succession Duties Act with reference to gifts made prior to death, the estate is entitled to that deduction. Deducting the 200,000*l.*, the residuary estate has been found to amount to upwards of 115,000*l.*, on which duty has been paid. The further claim of the Crown is founded on those statutory provisions which impose duty on gifts made with intent to evade duty.

In the Act of 1876 there were two sections which have a bearing on this question. Sect. 14 enacts to the effect that if a deceased person had made a gift of property with intent to evade the payment of duty, and such property were in the hands of the donee or of volunteers claiming under him, it should for the purposes of the Act be deemed part of the property of the deceased donor; and it adds that every voluntary gift made within one year prior to the death of the donor shall be presumed to be made with the intent to evade unless the contrary be proved. The same section declares that any voluntary gift of property to take effect upon the death of the donor shall be deemed to have been made with intent to evade payment of duty. It also contains a provision making donations mortis causâ part of the property of the donor.

Sect. 27 corresponds to the 8th section of the English Succession Duty Act of 1853. It enacts that where any disposition

of property shall purport to take effect presently, but by some secret arrangement capable of being enforced in a court of law or equity the beneficial ownership shall not bonâ fide pass according to such disposition, but shall in fact devolve on death, the taker shall be deemed to acquire the property as a succession, and, further, that where any disposition is judicially declared to be fraudulent and made for the purpose of evading the duty, the Court may declare a succession to have been conferred on the taker at such time and to such an extent as it shall think just.

There are difficulties in construing these clauses, occasioned probably by the fact that the Act imposes two sets of duties. The first part, in which s. 14 occurs, relates to probate duties. The second part, in which s. 27 occurs, relates to succession duties which are imposed by s. 20 on succession as defined by s. 21. Sect. 14 makes the property given with intent to evade part of the donor's estate; clearly for the purpose of bringing it under the head of probate duty. The same provision would appear to bring the same property within the definitions of s. 21, and so make it liable to succession duty, if it were not for the last clause of s. 27, by which the Court is empowered to declare a succession to have been conferred after it has declared a disposition to have been fraudulent and made for the purpose of evasion. Bundey J. lays it down in this case that to impose succession duty the Court must find fraud; and Boucaut J. says that s. 27 says substantially that an attempt to evade duty is a fraud. That question is obscure; but it is clear that neither s. 14 nor s. 27 is framed to interfere with gifts taking full effect in præsenti except in the one case of a gift made within a year of the donor's death; in which a positive rule is laid down that intention to evade shall be presumed, but may be rebutted by evidence.

In the Act of 1893 matters are much simplified. Only one duty, namely, succession duty, is imposed. Sect. 14 of 1876 disappears as a whole. Its provisions as to donations mortis causâ are the subject of a separate s. 10 of the present Act. Its provision as to voluntary conveyances to take effect on death has become useless; for such gifts confer a succession, and the

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object of imposing probate duty has ceased to exist. Its provision as to gifts made within a year prior to the donor's death is superseded by ss. 16 and 17 of the new Act.

Sect. 16 declares that a deed of gift shall mean and include, among other things, every non-testamentary disposition of property containing trusts or dispositions to take effect during the lifetime of the donor. It is then enacted by s. 17 "that the property given or accruing to any person under any deed of gift shall, in the event of the death of the donor within three months from the date of the deed of gift, be chargeable immediately after such death with succession duty according to the scale in the Third Schedule hereto except in cases of death by accident." The time which may be called that of probation is shortened from a year to three months, but the imposition of duty is made a positive and peremptory rule of law, and is not reached by the indirect road of an artificial presumption rebuttable by evidence.

The more general words of s. 14 and the whole of s. 27 of 1876 are replaced by s. 27 of the present Act, which runs as follows:—

"If any person has made or shall hereafter make any conveyance, assignment, gift, delivery, transfer declaration of trust, or other non-testamentary disposition, whether in writing or otherwise of any property, real or personal, or of any money or securities for money, or has given or shall give any mortgage or incumbrance, or has incurred or shall incur any debt with intent to evade the payment of duty hereunder, such disposition, mortgage, or incumbrance, or the incurring of such debt shall be deemed, so far as the circumstances will admit, to be a deed of gift under s. 16 hereof, and any property accruing to any person thereunder shall be liable to duty as if the donor had died within three months from the date thereof, but double duty shall be payable in respect of such property."

The matter was brought by summons before the Chief Justice sitting at chambers. The respondent tendered no evidence of intent, relying entirely on the inferences to be drawn from the dates of events and the documents. The learned Chief Justice dismissed the summons with costs, holding that the

act of the testator was sufficiently explicable by a desire to make a beneficial family arrangement, resembling though by no means identical with that of his will, and not alterable as his will was.

The respondent appealed to the Full Court, consisting of the Chief Justice and Boucaut and Bundey JJ. The Chief Justice adhered to his former conclusion; but, inasmuch as the two other learned judges were of a different opinion, the Court decreed that the order of the Chief Justice should be set aside, and that the originating summons should stand over to be dealt with on the merits, the registrar having made out a primâ facie case to be answered. From that decree the present appeal is brought.

In the reasons given by the learned Chief Justice for his opinion on the appeal, he again states his inability, from the mere perusal of the documents, and in the absence of evidence that the transaction was any other than it purported to be, to hold that the intent of the covenantor was to evade the duty. But, before dealing with the matter peculiar to the case before him, he takes broader and more general ground on the construction of the statute. He examines the meaning of the expression "evade," and the conclusion he comes to is in the following terms:—

"I am thus driven to the conclusion that the word 'evade' in s. 27 means to avoid by some direct means, by some device or stratagem. Without attempting, what is probably impracticable, to give an exhaustive definition of the phrase 'with intent to evade the payment of duty hereunder,' I am of opinion that the phrase would cover some arrangement, trust or other device, whether concealed, or apparent on the face of the non-testamentary disposition by which what is really a part of the estate of the deceased is made to appear to belong to somebody else in order to escape payment of duty."

Inasmuch as no evidence was offered to qualify the effect of the covenant and the actual dealings under it, it is a necessary conclusion that Mr. Simms completely deprived himself of the power of reclaiming the 200,000*l.*, and that he put that sum

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entirely in the power of the covenantees. Subject only to the delay resulting from the acceptance of interest in advance, the money might have been demanded from him at any moment. Whatever he might have wished or have expected to be done by his children, he took all risks. His children might forbear to enforce their claim against the wish of their father from deference and respect, or even from the reflection that the receipt of interest by their father would increase his estate, which they knew he intended for them. But changes of feeling might occur, quarrels or estrangements; or changes of circumstance, a death, an insolvency, or some great pressure for money; any of which things might lead to demands under the covenant such as the testator had made himself incapable of resisting. An act involving such consequences the learned Chief Justice holds to be a non-testamentary disposition of property within the meaning of s. 16 of the statute which is not subject to duty under s. 17 unless the donor dies within three months.

With regard to the expression "disposition of property," one of the other learned judges below doubted, and one denied, that a covenant to pay is such a disposition. It was not, however, so contended by the respondent's counsel at this bar. Their Lordships hold that a covenant to pay conferring complete ownership of the debt, and diminishing the covenantor's net assets by that amount, is rightly deemed to be a disposition of property within the meaning of the Act.

Boucaut J. holds that though the motives of the donor may be complex, yet, if the intent to evade duty be in his mind, s. 27 will operate on his gift. He takes it to be clear that Mr. Simms intended to avoid the duty, and he proceeds to discuss whether an intention to avoid is an intention to evade. He decides that it is. He points out the distinction between the Acts of 1876 and 1893: that s. 27 of the former enumerates schemes for "attempting to keep without the Act" and defeats them; whereas "Our Act of 1893 attempts a wider grasp, and says generally all transactions with intent to evade shall be doubly dutiable." In his view s. 27 of 1876 substantially says that an attempt to evade duty shall be a fraud; whereas the

Act of 1893 does not prohibit any transaction to evade duty, nor does it require any trick, sham scheme, or secret understanding, as the Act of 1876 did, to make the transferred property dutiable. And he insists on the importance of the consideration that the section clearly applies to valid gifts or debts, because it recognises that the property dealt with accrues to the donee, and fastens the duty upon it. The whole difficulty, he thinks, has been occasioned by the words in s. 27, which declare that the incurring of a debt shall, so far as circumstances will admit, be a deed of gift under s. 16.

With regard to this last declaration, which was discussed at some length during the argument, their Lordships concur with the learned judge that it is very difficult to understand why the words in question were introduced. But they do not concur in thinking that the whole difficulty of the case lies in those words, or indeed any part of the difficulty; for they have no appreciable bearing on the question which lies at the bottom of the whole discussion, namely, in what sense is the word "evade" to be used.

Bundey J. recognises to the full both the legal and the moral right of every man to dispose of his property if he can in a way which does not expose it to be taxed under the existing system of taxation. He points out the severity of a law by which, "for doing an act that is held not to be unlawful or immoral, a penalty is inflicted far beyond those imposed for offences against the criminal law that are punishable by fine; and it must be borne in mind that this penalty falls upon those who are innocent of the act that brought it about." He adds quite justly that a judge must guard himself from being adversely affected towards such a law. He substantially agrees with Boucaut J. so far as regards, first, complexity of motive, only adding that in this case he considers the motive of avoiding the duty to be the dominant one; secondly, the importance of the consideration that the Act strikes at real and valid transactions, only adding that he considers the present transaction to be a sham, because he thinks it left the control of the whole estate in the donor to as full an extent as if he had not executed the deed; and, thirdly, the significance of the differences

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between the two Acts of 1876 and 1893 in the omission of the term "fraudulent."

With respect to the opinion of Bundey J. that the covenant was a sham, their Lordships cannot find any evidence to support it. For all that appears, it was a genuine deed creating valid obligations on the covenantor, which might have been enforced at once. It is quite true, as the learned judges observe, that the Act strikes at valid transactions. But that is nothing new in the Act of 1893. The Act of 1876 did the same. No gift was thereby invalidated for being evasive, and, except to the extent of letting in the duty, neither past nor future enjoyment by the donee of the property evasively given to him was interfered with. It does not follow at all that because duty is made to attach on property validly transferred, it is also made to attach on property transferred in præsenti and placed beyond the control of the transferor and within the immediate control of the transferee.

Boucaut J. is pressed with the consideration that his reasoning would apply even if Mr. Simms had actually paid over the money instead of covenanting to pay it. Even in that case he thinks that the difficulty would consist, not in the nature of the act done, but in finding evidence of evasion, and he is not prepared to say that the duty would not attach. But, whatever arguments might be drawn from transfers completely executed, he thinks they do not extend to the incurring of a debt. Sect. 27, however, couples gifts, deliveries, and transfers with, and places them on the same footing as, the incurring of debts. It makes all alike subject to duty if done with an intent to evade.

It does not appear to their Lordships that an examination of the decisions in which the word "evade" has been the subject of comment leads to any tangible result. Everybody agrees that the word is capable of being used in two senses: one which suggests underhand dealing, and another which means nothing more than the intentional avoidance of something disagreeable. Beyond this, nothing is to be found having much bearing on the construction of the word, which depends entirely upon its use in the Colonial Acts.

According to the majority of the learned judges below, the Legislature of South Australia has enacted that every voluntary disposition of property, however honest and open, in favour of any person however innocent or even ignorant of the transaction, may, if the motive of escaping succession duty can be traced to the disposer, be made liable to what everybody speaks of as and feels to be a penal tax: and that, with no limit of time, and with no limit of person such as is provided in s. 14 of the Act of 1876. If a man for family or personal reasons conveys a property in trust for an absent son, and dies ten years afterwards, and it is shewn that when the conveyance was contemplated he said that an additional reason for making it would be avoidance of succession duties, then, according to this view of the Act, the owner of the property, whether the son or anybody claiming under him, would, though he might have been in enjoyment for years, find himself saddled with the tax doubled by way of penalty.

It is quite true, as Bundey J. intimates when he is pointing out the severity of the law, that Courts must nevertheless construe it according to its true meaning. But where there are two meanings each adequately satisfying the language, and great harshness is produced by one of them, that has legitimate influence in inclining the mind to the other. Now, if the word evade be taken to signify some contrivance between donor and donee, that which is pointed out as the greatest harshness of the enactment would be removed or substantially reduced, seeing that the donee would be a party to the transaction which causes loss to him. It is more probable that the Legislature should have intended to use the word in that interpretation which least offends our sense of justice.

Again, as regards the difficult question of mixed motive. If the thing which constitutes evasion is some contrivance between two or more persons, that is a substantial subject of inquiry with easily defined limits. The question whether an apparent transfer is also a real one is a question which occurs not very rarely, and on which the evidence of actual dealings by the parties can usually be brought to bear. But if we are to dive into the motives of a person acting by himself, and to

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find out whether a desire to avoid a tax, which probably everybody thinks desirable per se, was, when he gave away property, a dominant motive with him, or a substantial motive, or a minor motive, or any motive at all, that is an inquiry of a vague and indefinite kind. If the Legislature has ordered it there is no help: the Courts must obey as best they can, but they will certainly be led into the region of conjecture, as indeed this case, whether the conjectures be right or wrong, shews; and the chances of error and injustice will be considerable. Other things being equal, it is preferable to suppose that the Legislature contemplated the more ordinary and tangible kind of judicial inquiry, rather than the vague and more elusive one.

Turning again to a comparison of the two statutes, we find that the list of contrivances enumerated in s. 27 of 1876 is, in s. 27 of 1893, comprised in the short expression, "intent to evade"; for they are all attempts to evade, interpreting the word in malam partem. The same expression would clearly cover other contrivances, if other there be, of a like character. But their Lordships cannot find in this substitution of a comprehensive expression for an enumeration of instances any indication that the Legislature intended to extend the operation of the law to transactions of a wholly different kind; and to do so, moreover, by a retrospective enactment, without any attempt to provide the safeguards and qualifications necessary for the protection of existing arrangements, or for the prevention of great hardship in the new field of legislation. If there really was that intention, it seems unaccountable that the draftsman of the Act should not have said so in unmistakable terms, which are very easy to find, but instead of doing so should simply have reproduced the old word "evade" from the Act of 1876. That word, when used of actual evasion, as in s. 27 of 1876, and not merely of something which, not being an evasion, was by an artificial mental process to be presumed or deemed an evasion, as in s. 14, was taken as meaning some kind of underhand contrivance. Why should we think that its continued use meant anything else? What would there be on the face of the Bill to suggest to members

of the Legislature that they were being asked to extend the law concerning evasion to a number of innocent transactions?

In the case of this statute, it would be sufficient to say that clear enactments are required for the imposition of a tax, and that this enactment is not clear. But it is not necessary to have recourse to any such principle. Having regard to the language of the Act, to its connection with the Act of 1876, and to the consequences of the two admissible constructions, their Lordships hold that there is a strong preponderance of probability in favour of that which has been adopted by the learned Chief Justice. They think that the law of 1893 has, as the previous law had, left people at liberty to dispose of their property during life so that it should not form part of their estates at death for the purpose of taxation or any other purpose. Against death-bed gifts the public treasury is protected by s. 17. Against sham disposals it is protected by s. 27 on its narrower construction. Against real gifts on any large scale made while yet the ordinary expectation of life remains, it has probably been considered in South Australia as elsewhere that there is sufficient protection in the general reluctance of mankind to part with their property to others. The Supreme Court should have dismissed the appeal to them with costs. That is the decree which their Lordships will humbly advise her Majesty now to make in lieu of the decree appealed from. The respondent must pay the costs of this appeal.

Solicitors for appellants: *Trinder, Capron & Co.*
Solicitor for respondent: *O. E. Dawson.*

[PRIVY COUNCIL.]

J. C.*
1900
March 28.

In re EVANS *v.* WOODS.
Ex parte WOODS.

ON APPEAL FROM THE CONSISTORY COURT OF THE DIOCESE OF WORCESTER.

Clergy Discipline Act, 1892, *s.* 4, *sub-s.* 2—*Practice—Special Leave to Appeal—Frivolous Application.*

Leave to appeal will not be given under the Clergy Discipline Act, 1892, s. 4, sub-s. 2, in respect of the facts unless there is a primâ facie case; and, in the absence of even a definite suggestion to that effect, an application for leave is idle and frivolous.

THIS was a petition by William Aron Woods for special leave to appeal from the judgment of the Consistory Court of the Diocese of Worcester at a trial of the above matter held on October 7, 1898, when the petitioner was found guilty of cohabiting with a single woman, since married, as his wife in October and November, 1897, at Nottingham. Sentence was pronounced by the Bishop on November 21, 1898, deposing him from Holy Orders.

The petitioner alleged that owing to lack of means he had not been represented by counsel at the hearing, and had no opportunity of procuring evidence in exculpation, that the woman was not called as a witness, and that he fully anticipated that she would contradict the allegation.

Newson, for the petitioner.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Their Lordships are of opinion that no leave to appeal ought to be given in this case, and indeed they are of opinion that the application is itself a some-

* *Present:* THE LORD CHANCELLOR, LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and SIR FRANCIS H. JEUNE. *Ecclesiastical Assessors:* THE BISHOP OF LONDON, THE BISHOP OF WINCHESTER, and THE BISHOP OF ROCHESTER.

what idle and frivolous one. The language of the statute which gives a right to appeal is as follows (Clergy Discipline Act, 1892, s. 4, sub-s. 2): "If a defendant desires to appeal against any judgment of a Consistory Court, under this Act, in respect of the facts, he may petition for leave to appeal, and if he satisfies the Appellate Court that there is a primâ facie case leave shall be given, and he may appeal." Under the circumstances it is impossible to suggest that any primâ facie case has been made out. Ample evidence was before the Chancellor of the Consistory Court to justify the decision at which he arrived. It is idle to suggest that there is any ground for appeal on anything that has yet been seen or heard, and, indeed, even upon the present application, it is only suggested that some evidence might, or peradventure might, be forthcoming which might to some extent qualify the evidence given before. No definite proposition has been put before their Lordships, and no definite evidence suggested, in face of the fact that this gentleman himself, being a competent witness, did not tender himself for examination or deny the facts alleged against him. No new fact is now alleged that ought to reopen the inquiry. Their Lordships are of opinion that leave to appeal ought to be refused.

Solicitors for petitioner: *Maddocks & Colson.*

[HOUSE OF LORDS.]

H. L. (E.) 1900 *May* 14.

THE STEAMSHIP ISIS COMPANY, LIMITED AND OTHERS . . . . . } APPELLANTS;

AND

BAHR AND OTHERS . . . . . RESPONDENTS.

Ship—Charterparty—Full and Complete Cargo—Cargo in Frozen Condition.

By a charterparty made in contemplation of a mid-winter loading the charterers agreed to load at a port in the United States "a full and complete cargo of wet wood pulp which contains about 50 per cent. of water." The charterers loaded pulp of that description which was frozen. Frozen pulp is not compressible, and occupies more space than when unfrozen; consequently the cargo was less in quantity than it would have been in summer. The shipowners having brought an action against the charterers for the loss of freight thus caused, evidence was given that in winter wet pulp was usually loaded in a frozen condition:—

Held, that the obligation to load a full and complete cargo had been performed by loading as much pulp in a frozen condition as the ship would carry.

The decision of the Court of Appeal, [1899] 2 Q. B. 364, affirmed.

BY a charterparty of December 22, 1897, between the appellants as owners of the steamship *Isis* and the respondents as agents for the charterers, it was agreed that the ship should proceed to Bangor (Maine, U.S.) and there load under deck "a full and complete cargo of wet wood pulp which contains about 50 per cent. water" and deliver it at Manchester at the rate of 17*s*. per 1016 kilos. intaken weight of wet wood pulp. Should ice prevent the steamer from reaching Bangor then charterers to load the steamer at Bucksport on the same terms.

The *Isis* was prevented by ice from reaching Bangor and was loaded early in January 1898 at Bucksport. There are two kinds of wet wood pulp containing 50 per cent. of water: one known as the chemical pulp: the other as the mechanical pulp, which is the coarser and less expensive. It was mid-winter, there was, as usual there, a severe frost and the mechanical pulp which formed the larger part of the pulp

shipped by the *Isis* was frozen hard. When not frozen the pulp is flexible and can be compressed into a much smaller space than when it is frozen. Owing to its frozen condition it was not possible to stow as full a cargo as it would have been in summer by 450 tons. The appellants brought an action against the respondents as agents of the charterers to recover over 330*l.* dead freight on 450 tons of cargo short shipped, or alternatively a like amount as damages for breach of charter. At the trial before Bruce J. without a jury there was evidence that mechanical pulp was always or almost always shipped in a frozen condition in winter, for as it contains 50 per cent. of water it freezes during transportation from mill to seaboard, and a vessel loading in winter cannot possibly make as good a stowage as one loading in warm weather. The chemical pulp was said not to involve this loss of stowage, as it could be packed closely. Bruce J. entered judgment for the appellants for the amount claimed. The Court of Appeal (A. L. Smith and Rigby L.JJ., Vaughan Williams L.J. dissenting) reversed this decision and entered judgment for the respondents. (1)

Carver Q.C. and *Horridge* (*Hyslop Maxwell* with them) for the appellant. The respondents were bound by the charter-party to load a full and complete cargo, which meant that the cargo would fill the ship's carrying space. They were bound to load the wet wood pulp in its ordinary condition, that is unfrozen; a frozen cargo would not fill the ship's carrying space. True it was mid-winter, and the mechanical or coarser and less expensive pulp would naturally freeze on its journey from the mill to the ship. But they might have fulfilled their contract either by keeping the mechanical pulp in a warehouse till required, or by loading the chemical pulp, which does n freeze so readily and packs more closely; or by packing the mechanical pulp in square bundles. A tender of ice in a melted state would not fulfil a contract to load a cargo of ice. "Wet wood pulp" implies that the pulp shall be in its ordinary wet condition. It is said that the parties contemplated a mid-winter shipment and therefore a frozen pulp. But if so the

(1) [1899] 2 Q. B. 364.

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charterers might and should have stipulated that if the cargo could not be loaded in its normal condition the loss should fall on the owners. There was no evidence that according to the custom of the port of loading a delivery of frozen pulp constituted a full and complete cargo in winter.

[They cited *Cuthbert* v. *Cumming* (1) and *Grant* v. *Coverdale*. (2)]

Joseph Walton Q.C. and *Collingwood Hope* for the respondents were not heard.

EARL OF HALSBURY L.C. My Lords, this is an action by a shipowner. In substance the alleged breach for which he seeks to recover is that the merchant did not ship "a full and complete cargo." My answer to that is that, according to my view of the evidence, he did ship a full and complete cargo. It appears to me that the fallacy involved throughout the whole of the argument which has been addressed to your Lordships is this, that the obligation to ship a full and complete cargo is an obligation to fill the ship with something or other as full as she will hold. Commercially, of course, that proposition cannot be for a moment maintained. As was very candidly admitted in the course of the argument, the well-known and familiar expression "to ship a full and complete cargo" must have relation to the article which is to be shipped. If the parties want to have a contract which shall involve that every nook and cranny of the ship is to be filled with something, they must provide for it by some stipulation as to the amount of tonnage that is to be on board, or what not. But the ordinary and familiar obligation "to ship a full and complete cargo" must necessarily, and always has been held to, have relation to the thing to be shipped.

My Lords, that being the proposition of law, what is the fact here? The thing to be carried is a thing which is known in the trade by a familiar term. It is to be "wet wood pulp" containing 50 per cent. of water. The full and complete cargo may undoubtedly, according to different circumstances, be more or less in respect of the tonnage. But here again, if the parties

(1) (1855) 11 Ex. 405. (2) (1884) 9 App. Cas. 470.

had intended to make stipulations which should bring about some relation to the amount of tonnage to be carried, they should have provided for it by the charterparty. All that the charterparty does is to say that he shall load a full and complete cargo of wet wood pulp containing 50 per cent. of water. So far as regards the percentage of water, no complaint is made of its deficiency in that respect. It is not unimportant to remember, when one is dealing with another part of the case, that it is to contain 50 per cent. of water; but that may, as a matter of fact, produce tonnage in the ship of different amounts according to circumstances. If it is loaded in the summer, it may be that the ship will contain a great deal more tonnage. If it is loaded in the winter, by reason of the impossibility of the frozen article yielding to pressure, and therefore being packed so close as it otherwise would be, it may be that less tonnage will have to be carried in the ship. But what then? What question arises here upon that condition of things? It has been faintly contended that, as there are two articles in the alternative which you might carry, the merchant was bound to select that class of article which would make the greatest amount of tonnage carried by the ship. But if you analyze that proposition, you find that it is impossible to maintain it; and I am bound to say that it was felt to be so by the very able counsel who argued the case. He admitted that he could not shut his eyes to the proposition that no such obligation exists. If the ship may carry oats or hay, you are under no obligation to take the heavier article so as to cram the ship as full as she will hold.

Now here the thing which is actually brought for shipment is the thing contemplated by the charterparty to be carried. It is said that it becomes thicker and heavier, or lighter and more cumbrous in form and bulk for carrying about, according to the state of the weather; but neither of the parties appear to have had it in contemplation or to have had before their minds what I should have thought was clear enough. If the wet wood pulp was to contain 50 per cent. of water and was to be carried from the State of Maine, a place where it is not uncommon to find 14 degrees below zero of frost, anybody would think the

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Earl of Halsbury L.C.

shipment might occur at a time when the article to be carried was frozen.

But then it is said we are asked to imply an exception. My answer is, we are not asked to do anything of the sort. I look at the language of the charterparty and see what is the obligation created by it, and I find that the article specified there, "wet wood pulp," was tendered, and that article was loaded, and so loaded that the ship would hold no more. It seems to me that it is not a question of exception at all. The error which I notice in the judgments of Bruce J. and of Vaughan Williams L.J. is that each of them assumes a breach of contract, or at all events a departure from the fulfilment of the language of the contract, and suggests that there is nothing in the language of the charterparty which makes an exception. It does not arise in that form at all. The real defence is a traverse of the alleged breach. It is not true to say that the merchant did not load "a full and complete cargo"; he did load a full and complete cargo of the thing which was contemplated to be loaded by the charterparty.

My Lords, under these circumstances it appears to me that the plaintiffs fail, and I move your Lordships that the appeal be dismissed with costs.

LORDS MACNAGHTEN, MORRIS, SHAND, and BRAMPTON concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, May 14, 1900.

Solicitors: *Rowcliffe, Rawle & Co., for Hill, Dickinson & Co., Liverpool; Wynne, Holme & Wynne, for Forshaw & Hawkins, Liverpool.*

[HOUSE OF LORDS.]

THE OVERSEERS OF THE POOR OF THE PARISH OF DALTON AND THE ASSESSMENT COMMITTEE OF THE THIRSK UNION . . . . . } APPELLANTS;

AND

THE NORTH EASTERN RAILWAY COMPANY . . . . . } RESPONDENTS.

H. L. (E.)
1900
May 28.

Highway—Rate—Exemption—Liability to Repair Ratione Tenuræ—Sum paid in Discharge of Liability—Highway Act 1835 (5 *&* 6 *Will.* 4 *c.* 50) *s.* 33—*Highway Act* 1862 (25 *&* 26 *Vict. c.* 61) *s.* 35.

In a hamlet forming part of a township all the highways were repairable by the occupiers of lands ratione tenuræ, and highway rates were not leviable by reason of the exemption in the Highway Act 1835 s. 33. A railway company occupied lands in the hamlet, and, prior to the aftermentioned order, were liable ratione tenuræ to repair a portion of a highway therein. An order was made by justices under the Highway Act 1862 s. 35, by which it was declared that all the highways in the hamlet should be parish highways, and be repaired by the highway board of the district in which the hamlet was situated. The order fixed the sums to be paid by the respective occupiers of lands previously liable to repair ratione tenuræ "in full discharge of all claims thereafter in respect of the repair and maintenance of the highways" as provided by the Act. These sums were nominal in amount. They were duly paid. The company were subsequently rated in respect of their lands in the hamlet for expenses incurred in the repair of highways within the district, including those in the hamlet:—

Held, that the order did not operate to deprive the railway company of their previously existing exemption from highway rates, and that the company were exempt from payment of so much of the rate as was levied in respect of the repair of highways in the hamlet.

The decision of the Court of Appeal, [1899] 1 Q. B. 1026, affirmed.

PRIOR to 1880 the hamlet of Islebeck formed part of the township of Bagby in the Birdforth highway district. The hamlet was a place in which all the highways were repairable by the occupiers ratione tenuræ, and in which no highway rates were leviable by reason of the exemption in s. 33 of the

H. L. (E.) 1900 DALTON OVERSEERS v. NORTH EASTERN RAILWAY.

Highway Act 1835. The North Eastern Railway Company were occupiers of land in the hamlet and liable ratione tenuræ to repair eighty-four yards of a highway therein. In 1880 by an order of quarter sessions the hamlet was constituted a separate highway parish and annexed to the Birdforth highway district. In April 1881 on the application of the highway board (notwithstanding the opposition of the railway company) an order of justices was made under s. 35 of the Highway Act 1862 that all the highways within the hamlet should become and for ever thereafter be parish highways and be repaired and maintained by the Birdforth Highway Board. The order fixed the sums to be paid by the respective occupiers of lands within the hamlet previously liable to repair ratione tenuræ "in full discharge of all claims thereafter in respect of the repair and maintenance of the said highways or portions of highways or any of them or any part thereof." The sum fixed in respect of the railway company was twopence. It was paid.

In 1886 by an order of the Local Government Board the hamlet was detached from the township of Bagby and amalgamated with the township of Dalton in the Birdforth highway district. In 1897 a rate was made for purposes including the expenses incurred or to be incurred by the rural district council of Thirsk (the successors of the Birdforth Highway Board) in respect of the repair and maintenance of the highways within the district which comprehended the hamlet of Islebeck. The railway company having appealed to quarter sessions the appeal was dismissed subject to a special case stating the above facts and other matters not material to the present report. The Divisional Court (Wills and Kennedy JJ.) dismissed the railway company's appeal. (1) The Court of Appeal (A. L. Smith, Vaughan Williams and Romer L.JJ.) reversed the orders of sessions and the Queen's Bench Division and entered judgment for the railway company quashing the rate, on the ground that the exemption from liability to highway rates had not determined. (2) Against this decision the overseers brought the present appeal.

(1) [1898] 2 Q. B. 66. (2) [1899] 1 Q. B. 1026.

April 3. *Marshall Q.C.* and *J. H. Gawan Taylor* (*Macmorran Q.C.* with them) for the appellants. The exemption conferred by s. 33 of the Highway Act 1835 is not an exemption from rates to be thereafter assessed in respect of highways generally: it is only an exemption from the pre-existing liability to repair ratione tenuræ, and from the particular rate which is to be made under s. 62 of that Act. The old liability was to repair a particular highway, and the exemption was coextensive only with that liability and ceased on April 11, 1881, when the highway was made repairable by the Birdforth Highway Board. This was the argument which prevailed in *Heath* v. *Weaverham Overseers.* (1) There can moreover be no claim for exemption under the Act of 1835 because there is no rate for the highway "hereby imposed." The area has been extended over which the assessment prevails. It is a different rate imposed by a different body. The same reasoning applies to the alleged discharge under s. 35 of the Highway Act, 1862. The exemption there given is from the liability referred to in s. 34—i.e. from the liability ratione tenuræ which had already been annulled. The whole system of local government and of raising funds for public purposes has been transformed by a succession of statutes. The exemption was from a parish liability and cannot be extended so as to be a discharge from a district liability from rates imposed by a wholly different authority for entirely different purposes. The capital sum fixed by the justices represented only the difference between the burden of a liability to repair ratione tenuræ and the liability to pay highway rates. The amount was ridiculously inadequate to represent the value of an exemption for ever from all liability.

A. T. Lawrence Q.C. and *R. Cunningham Glen* for the respondents. The only liability of the respondents which ever existed was to repair a portion of a road in the hamlet of Islebeck. It was discharged once for all by the order of the justices in 1881. It cannot be revived simply by the succession of other local bodies to the powers and jurisdiction of the previous authority. The language of s. 35 of the Act of 1862

(1) [1894] 2 Q. B. 108.

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is perfectly clear. A capital sum is to be fixed which is to be "in full discharge of all claims thereafter in respect of the repair and maintenance of such highway." These words are inconsistent with the accrual of any future liability. *Reg.* v. *Heath* (1) is decisive and shews that the levying under one charge of highways and poor rate does not take away an exemption from payment of a highway rate. *Heath* v. *Weaverham Overseers* (2) has no application, as the highway itself had been altered and the res in respect of which the exemption had been enjoyed had been destroyed.

Marshall Q.C. in reply.

The House took time for consideration.

May 28. EARL OF HALSBURY L.C. My Lords, by s. 35 of 25 & 26 Vict. c. 61, a person liable to repair a highway ratione tenuræ was enabled by a process described in the section in question to apply for an order relieving him from the responsibility of repairing in future; and the justices were authorized in this form of procedure to make an order by which they fixed a certain sum to be paid by the person so applying in full discharge of all claims thereafter in respect of the repair and maintenance of such highway.

The language of the statute seems very plain, and it is not denied that the proper procedure was followed; but for some reason, which does not very clearly appear, the justices fixed a merely nominal sum, and for a considerable time the order thus made has been pursued.

My Lords, I know of no reason, in the absence of fraud, why the bargain thus made under statutable authority is to be set aside simply because the magistrates did not fix, as they should have done, a capital sum such as in their judgment would have been adequate payment in respect of the liability of which they were relieving the proprietor of the land. I do not know what led to this strange result. It may have been an honest blunder as to what was the meaning of the Act of Parliament; but, whatever it was, it is impossible now to treat

(1) (1866) L. R. 1 Q. B. 218. (2) [1894] 2 Q. B. 108.

what was done under the powers of the statute as if it was of no avail.

I therefore move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of opinion that the order of the Court of Appeal must be affirmed.

The question seems to turn entirely upon s. 33 of the Highways Act, 1835, s. 35 of the Highways Act, 1862, and the order of the justices of April 11, 1881. [His Lordship stated the facts.]

The amount fixed by the justices as the composition to be paid by the North Eastern Railway Company was the capital sum of twopence. It does not appear how that particular sum was arrived at, though it is suggested that the justices were under the impression that after the order was made the railway company would be rateable with other occupiers for the repair and maintenance of all the highways in the district. As the railway company objected to the order altogether, the error, if there was an error, cannot at any rate be laid to their door.

The railway company duly paid the composition with which they were charged, and thereupon, as it seems to me, according to the express language of s. 35 of the Act of 1862, which follows the language of s. 62 of the Act of 1835, they became exempt from all future claims in respect of the repair and maintenance of the highways in the hamlet of Islebeck.

The Divisional Court, whose judgment was reversed on appeal, held that the sum fixed by the justices under s. 35 of the Act of 1862, "in full discharge" of all claims thereafter in respect of the repair and maintenance of the highways in Islebeck, was intended to be nothing more than a composition for the extra burden, if any, of their old liability by reason of tenure over and above the burden which would fall upon them if and when the highways became repairable by a general rate, to which it was assumed that they in common with all other occupiers would become liable. It seems to me that it is impossible to deduce that meaning from the language of the

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Act. The only apparent difficulty in the case comes from the circumstance that the justices have assessed the composition payable by the railway company at a sum which seems absurdly inadequate; but the mistake of the justices cannot affect the construction of the Act or the immunity from future liability which their order, duly and regularly made, purports to confer.

I agree that the appeal must be dismissed with costs.

LORD DAVEY. My Lords, I am really unable to follow the learned counsel's argument that the railway company are liable to highway rates in this case. He says that the rate is imposed on all owners of property—which is quite true if they are not exempted by statute. He then says that the exemption lasts only so long as the liability to repair ratione tenuræ exists—and something to this effect was held in the case of *Heath* v. *Weaverham Overseers*. (1) Where does he find this in the Act? The exemption is to be found in s. 33 of the Act of 1835, which enacts "that when property or the owner or occupier in respect thereof has previous to the passing of this Act been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof or of highway rate, the said property and the owners and occupiers thereof shall be exempt from the payment of the rate hereby imposed." That section, therefore, exempts persons from highway rates who were previously to the Act exempt. I observe in passing that the rate for the repairs of highways is none the less a highway rate levied under the Act (which is still in force) because for convenience it is now levied as one rate with the poors rate. But then under s. 62 of the Act of 1835 and s. 35 of the Act of 1862 powers are given to the justices to commute the liability to repair and maintain a highway ratione tenuræ for payment either of an annual sum or of a lump sum once for all—i.e., the person liable pays a sum certain to the highway authority to do the work instead of doing it himself. Obviously, therefore, if the exemption does not continue, he pays twice over—once in discharge of his liability ratione tenuræ and again in the form of a highway rate. To get out

(1) [1894] 2 Q. B. 108.

of this difficulty counsel argued that the payment ought to be fixed so as to represent the difference between the expense entailed by his former liability and what he would pay in the form of highway rates. But in my opinion this is a clear contradiction of the words and scope of the Acts.

I concur in the judgment proposed.

LORD BRAMPTON. My Lords, many years before the General Highway Act, 1835 (5 & 6 Will. 4, c. 50), was passed, the hamlet of Islebeck, an outlying part of the township of Bagby, in the North Riding of Yorkshire, was a place in which all the highways were repairable by the owners and occupiers of lands in the hamlet ratione tenuræ, who by reason of such liability were exempt from the performance of statute duty, and from assessment to any highway rate.

In the year 1880 the hamlet was constituted a separate highway parish annexed to the Birdforth Highway District. In March, 1881, application was made by the highway board of that district, under s. 35 of the Highway Act, 1862 (25 & 26 Vict. c. 61), that the highways in Islebeck, then repairable by the respondents and three other occupiers of lands in the hamlet, might be made parish highways, to be thenceforth repaired and maintained by the highway board. The respondents opposed the application, but after hearing them and the other occupiers, namely, Cleasby, who was also waywarden of the hamlet, Knowlson, and Feather, the justices on April 11 made the order asked for—that such highways, being altogether of the length of 3164 yards, should become, and for ever thereafter be, parish highways, and be repaired and maintained by the Birdforth Highway Board. They also found by their order that the respondents were thus liable to repair 84 yards of the said highways, Cleasby 946 yards, Knowlson 1240 yards, and Feather 894 yards; and, being required by the statute to fix the sum to be paid by such occupiers respectively to the highway board, they fixed the sum of 2*d.* as the amount to be paid by the respondents, 3*d.* by Cleasby, 4*d.* by Knowlson, and 3*d.* by Feather "in full discharge of all claims thereafter in respect of the repair and maintenance of the said

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highways or any part thereof." Each of these sums was duly paid.

On the face of this order it would appear to be most unfavourable to the highway board, who by it were made for ever responsible for the repair of upwards of a mile and three-quarters of highways for mere nominal sums, in the aggregate amounting to 1*s.* only. That there was no appeal however against that order, as there might have been, will not be a matter of surprise to those who a little carefully consider the probable though somewhat diverse views of those interested in the matter.

The highway board desired to obtain the entire control of the highway under consideration, and, without seeking legal advice, assumed that, on the extinction of the liability of the occupiers to repair, the extinction of the exemption from the highway rate would follow as a matter of course, by which they would be abundantly indemnified. They therefore were content, and asked for no other security against the costs of the repairs. The occupiers, other than the respondents, one of them being the waywarden, probably knew and approved of the action of the board, knowing that a highway rate, if imposed, as they took it for granted it would be, would be assessed without regard to the extent of the liability to repair of each individual occupier, but on the rateable value of their holdings, and that the railway of the respondents would be assessed at a far greater amount than would represent the share of the repairs for which the respondents were responsible, and that such excess would be to their advantage, in that it would lessen their own assessments. They therefore looked cheerfully on the order, while the respondents, probably more accurately advised as to the highway rate, when they saw that on payment of the 2*d.* awarded by the order they were to be relieved for ever of all future obligation in respect of their eighty-four yards, were not indisposed to let the matter rest as settled by the justices. Anyhow, as neither party appealed, each became finally bound by it and its legal consequences.

In the following August, when the time for appealing had expired, the respondents were speedily enlightened by the

highway board as to its views and intentions, for on the 16th of that month a rate "for the necessary repairs of the highways of Islebeck at 5½*d.* in the pound" was made and signed by Cleasby, the waywarden. In this rate the total rateable value of all the assessable property in the hamlet was stated as 1521*l.* 15*s.*, and the amount to be levied as 34*l.* 17*s.* 3*d.* Of these sums 1099*l.* 10*s.* was assigned as the rateable value of the railway occupied by the respondents, and 25*l.* 3*s.* 11*d.* as the amount payable by them, leaving 422*l.* 5*s.* only as the rateable value of the united holdings of all the other occupiers, and 9*l.* 13*s.* 4*d.* only as the amount payable by them. These figures are somewhat startling when one realizes what they mean as contrasted with the past liabilities ratione tenuræ of the parties respectively. The eighty-four yards of highway the respondents were bound to repair represented about one-fortieth part of the whole length of the highways in the hamlet, the other occupiers being responsible for 3080 yards, while by the rate as made three-fourths of the amount to be levied was charged on the respondents and one-fourth only on all the other occupiers, amounting practically to a charge against the respondents of 6*s.* per yard for their eighty-four yards, but against the other occupiers a fraction under three farthings only. Against this rate the respondents lodged an appeal, which was allowed by the quarter sessions, and the names of the respondents were struck out of the rate upon the ground that they were then exempt from any liability in respect of the repair of the said highways.

Between that time and the year 1897 no further attempt was made to assess the respondents to such a rate. In June, 1897, however, Islebeck having in the meantime been separated from Bagby and amalgamated with the township of Dalton in the Thirsk Poor Law Union, a fresh experiment was made to impose a highway rate on Islebeck; but this time it assumed the form of a rate at 11*d.* in the pound for the relief of the poor of the parish of Dalton, "and for other purposes chargeable thereon," such other purposes being the expenses incurred by the Thirsk Rural District Council in respect of the highways within that district. In this rate the respondents were assessed

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upon the same rateable value as in the rate of 1881—the sum sought to be recovered from them being over 50*l*. Against this rate the respondents duly appealed; but on the hearing the appeal was dismissed by the quarter sessions, subject to the special case now before this House, which was first argued before a Divisional Court of the Queen's Bench, who affirmed the decision of the quarter sessions.

The Court of Appeal, however, having unanimously reversed that judgment, your Lordships are now called upon finally to determine the matter, two substantial questions being stated for your consideration. First, whether the justices who heard the appeal against the 1897 rate were bound by the decision of the justices who heard and determined the appeal against the rate made in 1881. As to which my strong impression is that they were not so bound; but, in view of the opinion I have formed as to the second question, I do not feel it necessary to give a more definite answer.

The second question—whether the respondents are exempt from the payment of so much of the rate as was assessed in respect of the repair and maintenance of the highways in the hamlet of Islebeck—ought, in my opinion, to be answered in the affirmative.

That the rate, so far as it was made to provide funds for the repairs of the highways, although incorporated in, and by statutory authority collected with, the rate for the relief of the poor, was to all intents and for all purposes a highway rate within the meaning of s. 27 of the Act of 1835, admits of no reasonable doubt. The incorporation and collection together of the poor and highway rates as one rate was allowed as a mere matter of convenience, and cannot in the least degree affect the exemption from the highway rate which had existed from time immemorial, and was expressly confirmed and made the subject of express enactment by s. 33 of the Act of 1835. Such enactment could not be extinguished without legislative interference, which is nowhere to be found, nor could it reasonably be looked for, considering that the Legislature by s. 35 of the Act of 1862, in allowing justices to order the transfer of the liability of the occupiers to repair the highways to the

highway board, has enabled them at the same time to fix amounts and order those amounts to be paid by the occupiers who are relieved of their obligations to the highway board by way of commutation or indemnity in respect of the new liability cast upon it. In the whole of that enactment I find no trace of any intention to impose a highway rate upon such occupiers in addition to those fixed amounts. Certain I am that, if such an intention existed, some apt words would have been used to express it.

The 62nd section of the Highway Act, 1835, though superseded, and amended and re-enacted by the 35th section of the Act of 1862, throws valuable light upon the intentions of the Legislature in directing the justices to fix a sum to be paid by each occupier about to be relieved of his liability to repair. It expressly empowered the justices alternatively to order either an *annual* sum to be fixed by them as the proportion of the expenses of repairing such highway to be paid by such occupiers to the surveyor of the highways; *or*, instead of fixing such proportion, to fix a certain sum to be paid in full discharge of all claims thereafter in respect of the repairs of such highways, giving certain directions for the investment of such latter sum.

I cannot understand how it can be doubted that the object of the Legislature in 1835 was, when it relieved the occupier of his liability ratione tenuræ to repair, and shifted such liability on to the highway authority, to impose upon such occupier the obligation to pay to that authority an annual sum; *or*, one amount to be fixed by the justices, the interest of which invested would yield an annual amount sufficient to cover the expense of *that portion* of the highway for the repair of which he had been relieved of his liability; no more, no less. The object of the Legislature in 1862 was to provide for the future repairs by one fixed sum only. A competent bench of justices would find no difficulty in fixing either of these sums, if the highway authority thought fit to place the proper materials for so doing at its disposal. An analogous proceeding is of every-day occurrence in other compensation cases.

The appellants have struggled hard to present a plausible argument in support of the view taken by them, that the

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Legislature intended to impose the payment of a fixed sum in addition to the highway rate, and they certainly have presented a very ingenious one, which seems to have captivated the Divisional Court and led it a little astray. As I understand their suggestion, it amounts to this: that with the extinction of the liability to repair the Legislature intended to extinguish also the exemption from the rate, and at the same time to impose the payment of a fixed sum to the highway authority to indemnify it against any loss it might sustain in the possible event of the cost of repairing and maintaining the length of highway which any particular occupier had theretofore repaired amounting to a larger sum than that he might be called upon to pay under a highway rate. If this was meant (though I cannot think it possible) I can only say that the Legislature was very unhappy in the language chosen to express that intention. In my opinion, the language of s. 35 of the Act of 1862, under the authority of which the order in question was made at the instance of the highway board (under the Highway Act, 1864), carefully read, is clear and unambiguous, and expresses the true intention of the enactment, which enjoins upon the justices that they "shall in such order fix a certain sum to be paid by such person or corporation to the highway board of the district *in full discharge of all claims thereafter in respect of the repair and maintenance of such highway*." This must cover the cost of all repairs which, from and after the making of the order, were imposed on the highway board. To fix upon any occupier a rate in addition to such fixed sum would be to impose on him a double burden, which clearly was never in contemplation.

I do not forget that the sums fixed by the magistrates in the order are ridiculous if they were intended to represent the costs of future repairs; but that is not the fault of the justices, who doubtless would have fixed substantial sums if they, on sufficient materials, had been asked to do so. I cannot help feeling that the highway board, in obtaining that order, a little overreached itself. In its eagerness to fix the highway rate upon the respondents a burden unduly onerous, and from which they were exempt by law, the board threw away a

substantial claim to a fixed sum they were entitled to make before the justices, and advisedly asked for and accepted a mere nominal amount. Whose fault was that? It is too late now, after a lapse of twenty years, to amend those proceedings, whether they were conceived in ignorance or by design. It is satisfactory, however, to know that the public will not suffer, for the ways must be still repaired by the highway board; and it may also be satisfactory to the board to know that they may still fall back for reimbursement upon the district fund, to which, however, they cannot ask the respondents to contribute as they have sought to do.

I do not feel it necessary to cite at length the authority of *Reg.* v. *Heath* (1), in which the judgment delivered by Lush J. is strongly in support of the view I have taken.

Nor do I think that *Heath* v. *Weaverham Overseers* (2) assists much in enabling your Lordships to determine the present case, for in this case the same section of the Act which sanctions the transfer of the liability to repair to the highway board provides for the cost of future maintenance.

In my opinion, the judgment of the Court of Appeal ought to be affirmed, and this appeal dismissed with costs.

LORD ROBERTSON. My Lords, my opinion may be stated in a very few sentences.

In the beginning, the only legal liability of the respondents in relation to this highway was their liability, ratione tenuræ, to repair certain eighty-four yards, and, as the special case expressly states, no highway rates were leviable by reason of the exemption contained in s. 33 of the Highways Act, 1835. Now, in 1881, the respondents' liability ratione tenuræ was commuted into a money payment under the 35th section of the Highways Act, 1862. Whether the amount fixed was much or little seems to me wholly irrelevant to the present question, although I agree with Romer L.J. as to the proper principle upon which the sum should be calculated in such a proceeding. But the point here is that, the sum being fixed, it is paid "in full discharge of all claims thereafter in respect of the repair

(1) L. R. 1 Q. B. 218. (2) [1894] 2 Q. B. 108.

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and maintenance of the highway." Those words are absolute, and they exactly square with the antecedent legislation; just as the occupier bound ratione tenuræ was free from highway rates, so the same occupier, once this liability is turned into a money payment, continues free from all other forms of contribution to the highways, including rates.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, May 28, 1900.

Solicitors: *Robbins, Billing & Co., for C. McC. Swarbrick, Thirsk; A. Kaye Butterworth.*

[HOUSE OF LORDS.]

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THE MAIN COLLIERY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

DAVIES . . . . . RESPONDENT.

Employer and Workman—Compensation—Dependants—Evidence of Dependency on Child's Earnings—Standard of Living—Workmen's Compensation Act 1897 *c.* 37 *s.* 7 *sub-s.* 2.

A father earning wages may be in part dependent upon the earnings of his child within the meaning of the Workmen's Compensation Act 1897, and there is evidence upon which the father may be found to be in fact so dependent and to be entitled to compensation for the death of the child, where it is proved that the child contributed to the family wages fund, that the father received the contribution and spent it in maintaining himself and his family.

Whether there is dependency is entirely a question of fact in each case, irrespective of the standard of living in the neighbourhood or the class to which the family belong. The Act sets up no such standard: the actual means of living and expenditure need alone be regarded. (See the judgments of Earl of Halsbury L.C. and Lord Davey; Lord Shand contra.)

Simmons v. *White Brothers*, [1899] 1 Q. B. 1005, discussed.

THE respondent's son was killed by an accident arising out of and in course of his employment by the appellants as a

haulier. He was aged sixteen, earned on an average 8*s.* a week, lived at home with his father and mother, and gave them all his wages, they finding him in food, lodging, clothes, &c., and giving him an occasional 6*d.* for pocket-money. There were five other children, two of whom also paid their wages into the common fund. The respondent was a collier earning about 25*s.* a week.

The respondent and his wife requested an arbitration in the county court at Neath under the Workmen's Compensation Act 1897 with respect to the compensation payable to them as dependants in respect of the injury to their son. They claimed to be partially dependent on their son's earnings at the time of his death.

The appellants paid into court 10*l.* for the reasonable expenses of the son's burial. The county court judge held the arbitration and made his award declaring that the respondent was entitled as dependant to compensation for the injury and ordering the appellants to pay the sum of 23*l.* 8*s.*, being 13*l.* 8*s.* in addition to the 10*l.* paid into court, to the respondent as such compensation. An appeal by the company on the ground that there was no evidence given before the judge upon which he could find that the respondent and his wife or either of them were dependants within the meaning of the Act, was dismissed by the Court of Appeal (A. L. Smith, Rigby and Vaughan Williams L.JJ.).

C. A. Russell Q.C. and *St. J. Francis Williams* (*Ruegg Q.C.* with them) for the appellants. The county court judge misdirected himself in holding that there was any evidence that the respondent was a dependant within the Workmen's Compensation Act 1897. By s. 7 sub-s. 2 "dependants" means in England and Ireland such members of the workman's family specified in the Fatal Accidents Act 1846 as were wholly or in part dependent upon the earnings of the workman at the time of his death. Under the Act there referred to, Lord Campbell's Act of 1846, 9 & 10 Vict. c. 93, it is not necessary to prove dependency: the action is to be for the benefit of the wife, husband, parent and child. Under the Act of 1897 now in

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question it is necessary to prove dependency. What then is the test of dependency? The provisions in the First Schedule to the Act s. 1 (*a*) speak of dependants wholly dependent and dependants in part dependent upon the workman's earnings, and provide that the amount payable shall be reasonable and proportionate to the injury to the dependants. The Legislature cannot have meant that the mere receipt by a father of a contribution by a child to the common fund should make the father a dependant. The money contributed by the child might be spent by the parents in some luxury or unnecessary indulgence. A child is under no legal obligation to support his parents or any of the family. A "dependant" means a person who cannot live without the contribution in the manner usual in his class. He must be dependent on it "for the ordinary necessaries of life having regard to his class and position in life": *Simmons* v. *White Brothers*. (1) In the present case there was no evidence to this effect or in relation to it: no evidence even that the boy's wages left a surplus after paying for his keep, clothes, &c., or that the surplus (if any) was spent upon necessaries according to the class. The judge held that because the parents received the boy's wages as part of their income therefore they were in part dependent upon the son, and (without any evidence on the point) he held that 5*s*. a week would pay for the boy's keep and clothing and there would be a surplus of 3*s*., and he gave the respondent 23*l*. 8*s*. or 3*s*. a week capitalised for three years. There must be some standard of living by which the question of dependency can be determined and the natural standard is that of the neighbourhood and class of life.

Sir R. T. Reid Q.C., *Brynmor Jones Q.C.* and *S. T. Evans* for the respondent were not heard.

EARL OF HALSBURY L.C. My Lords, it appears to me that a very short question of fact had to be determined by the county court judge in disposing of this matter. He has found as a fact that there was a dependency; the extent and degree of that dependency of course is not under appeal. He may have been right or he may have been wrong as to the exact

(1) [1899] 1 Q. B. 1005, 1008.

amount which he has awarded, but whether he was right or wrong as to the amount is a matter with which your Lordships have no concern. The sole question before us is whether there was any amount of dependency at all giving a right to anything. If there was of course this appeal must be dismissed.

Now, my Lords, as to that question I do not think the Legislature ever intended that there should be any sharp definite line drawn, but that in each case the question must turn upon whether there is or is not what the Legislature has described as a condition of dependency as being the test whether or not a person is entitled to any compensation by reason of a death.

Now, what is dependency? The notion that a person has a legal obligation upon him to keep his whole family when he earns a considerable part of what is required himself, and when the other members of the family only contribute a small part, appears to me to account for the Legislature having introduced not only dependency, but partial dependency. Was there or was there not partial dependency in this case—that is to say, was there evidence upon which the county court judge might have come to the conclusion that there was? For my own part I cannot in the least doubt that there was. The whole family were all dependent upon the wages. Whose wages? Partly this boy's wages. It is said that this boy was under no obligation to support his brothers and sisters. No one denies that; but it appears to be forgotten that the obligation is upon the head of the family. He is by law bound to support his family, and he would be punished by law if he did not support them. Therefore, the burden being upon the father of the family, the father of the family in his turn obtains from the wages of those who are being maintained by him a partial contribution to the general family fund. Why is not the father in the discharge of that burden partly dependent upon the earnings which he receives from his children? I am not able to answer that question. It appears to me that he must be relying or dependent—call it what you please—for the means by which he discharges his legal obligation upon the funds

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supplied to him, or partly supplied to him, by the children who earn those funds.

My Lords, if that is true it appears to me that there was evidence by which the county court judge was guided, and was properly guided, in this case. If it is true that there was in this case a sum of 8*s*. a week contributed by this boy to the common family fund, it appears to me to be perfectly clear that the father was to some extent "dependent" upon that son's earnings—that is to say, he was partially dependent upon the earnings of the son for contributions for the maintenance of the family: and, therefore, for discharging the legal obligation which he was under he was dependent upon the sum so supplied by the son.

My Lords, I am unable to see that there is anything in this case beyond a mere question of fact. I decline to assume that the Legislature has contemplated a particular "standard"—I am not quite certain what it means, but I am quite certain that no human intellect would be able to ascertain exactly what the standard was if one had to deal with such a question—a standard dependent upon what was the ordinary course of expenditure in the neighbourhood and in the class in which the man lived. To my mind that is a problem so extremely obscure that I cannot believe that the Legislature intended it to be solved. What the family was in fact earning, what the family was in fact spending, for the purpose of its maintenance as a family seems to me to be the only thing which the county court judge could properly regard, and, that being the thing which the county court judge ought to regard, I think in this case he has regarded it, and accordingly it appears to me that the question of fact, and the only question of fact, was one which the county court judge has properly answered.

My Lords, I observe that in this case Rigby L.J. says that he should have found exactly as the county court judge has found; so should I. I entirely concur with that. Whether I should have found the exact amount is a different question; but I should have thought that the course pursued was the proper course to pursue, and I hope that is the course that will be pursued. These extremely refined notions as applicable to

the administration of this Act, creating some hypothetical standard within which the judge is obliged to act, would not to my mind be likely to conduce to the clear administration of the law. At all events, in this case it is enough to say that I think there was evidence which justified the county court judge in the conclusion at which he arrived, and I move your Lordships that this appeal be dismissed with costs.

LORD MORRIS. My Lords, I concur entirely with the reasons which have been assigned by the Lord Chancellor.

LORD DAVEY. My Lords, I also concur.

I think the learned county court judge puts the case extremely well. "I think it is clear," he says, "that as the boy did give his parents his wages, and the parents did receive and depend on the son's wages as a part of their income or means of living, the question is answered." Observe, my Lords, the county court judge says, "as a part of their income or means of living," by which I understand him to mean their actual income or means of living. I agree with my noble and learned friend on the Woolsack that that is a much more satisfactory way of construing this Act—to look at their actual income and actual expenditure rather than to introduce some vague and uncertain standard which it is impossible to lay down with precision.

LORD SHAND. My Lords, I am of the same opinion. I think in this case the learned county court judge had ample materials for coming to the conclusion at which he arrived. He had all the facts before him in regard to the money which was received from each of the members of this family, and I agree with him in thinking that there was a mutual dependency between the parties—that each depended to some extent upon the other—and that the father was to some extent dependent upon his son's wages.

And, my Lords, I also agree with the view which the Lord Chancellor has stated—that in looking to the position of the family, although you cannot give a sum directly to brothers

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and sisters under Lord Campbell's Act, it is fair and reasonable to look at the general obligations which the father had upon him for the maintenance of himself and a large family, as compared with a man who had no children or one or two children only.

Although I say this, the case has been suggested that the father might be in very different circumstances—in quite good circumstances. It has been argued that if the father were well off, for example, it could not then be shewn that he was "partly dependent" upon his son. With deference, I am of opinion that that argument is sound. I think that in such a case there must be some standard taken in considering questions of this kind. I do not think you are to look at the mere question, "Did the father use the money?" "Did he spend the money?" and if so, say that he having received, used, and spent the money, it follows that there was a partial dependency. A man might receive the money and use and spend it without being in any degree dependent upon the earnings of his son.

My Lords, taking this view of the argument, I concur in the observations made by Collins and Romer L.JJ. in the case of *Simmons* v. *White* (1) in reference to a passage in Minton-Senhouse's book where he deals with this question. I think he is right in saying, "Each case must stand on its own merits"—that is, depend on its own facts; but I think you must bring in some principle when you come to see what the effect of those facts is. As Romer L.J. said, "As a question of principle is to some extent involved in the present case, I desire to say I agree with the passage in Minton-Senhouse's book." I too think that in such a case as supposed, though it will probably seldom occur, "a question of principle is to some extent involved." The question of some standard must come into a case where a father has been well off otherwise, and yet spent money received as his child's wages. Without reading again the passage in Mr. Minton-Senhouse's book, I agree in thinking that it suggests the proper principle for the decision of cases of this kind in saying that "dependent

(1) [1899] 1 Q. B. 1007.

probably means dependent for the ordinary necessaries of life" (or for maintenance of himself and his family) "for a person of that class and position in life."

LORD BRAMPTON. My Lords, I entirely agree in the judgment which the Lord Chancellor has pronounced and in the reasons he has given to this House. And I desire also to say, as Rigby L.J. said, I entirely agree with the county court judge in the decision to which he came.

LORD ROBERTSON. My Lords, I agree in thinking that the question whether this father was "dependent" was a question of fact, and that there was evidence to support the decision of the county court judge.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 22, 1900.

Solicitors: *H. P. Becher, for W. V. Simons, Pontypridd; Sharpe, Parker & Co., for Cuthbertson & Powell, Neath.*

[HOUSE OF LORDS.]

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POWELL . . . . . APPELLANT;

AND

THE MAIN COLLIERY COMPANY, LIMITED . . . . . RESPONDENTS.

Employer and Workman — Compensation — Arbitration — Time for taking Proceedings — "Claim for Compensation" — Workmen's Compensation Act 1897 *c.* 37 *s.* 2 *sub-s.* 1.

By s. 2 sub-s. 1 of the Workmen's Compensation Act 1897 proceedings for the recovery under the Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable, and unless "the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury . . . ."

"The claim for compensation" means, not the initiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of a claim for compensation sent to the workman's employer.

A workman who had been injured in the course of his employment sent to his employers within six months a notice of the accident and also a notice stating that he claimed a certain amount as compensation for the injury. More than six months after the accident he filed a request for arbitration in the county court:—

Held, that the proceedings were in time.

The decision of the Court of Appeal, [1900] 2 Q. B. 145, reversed and the award of the county court judge restored.

THE appellant, a workman in the employ of the respondents, was on December 21, 1898, injured by an accident arising out of and in the course of his employment. On May 2, 1899, he gave the respondents a written notice of the accident, and on the same day he gave them a written and formal notice of his claim for compensation. The exact words of this claim are set out in the Earl of Halsbury's judgment. In October 1899 he filed a request for arbitration in the county court at Neath in Form 1 of the forms under the Workmen's Compensation Act 1897. The respondents contended that the request should have been filed within six months from the date of the injury and that the proceedings were out of time, but the county

court judge overruled this, and made an award of compensation in favour of the appellant. On appeal by the respondents the Court of Appeal (A. L. Smith and Collins L.JJ., Romer L.J. dissenting) held that the proceedings were out of time under the Act, set aside the award and entered judgment for the respondents. The applicant appealed to this House.

June 21. *Sir R. T. Reid Q.C.* and *S. T. Evans* (*Redwood Davies* with them) for the appellant. The Court of Appeal has held that by "the claim for compensation" the Workmen's Compensation Act 1897 s. 2 sub-s. 1 meant the initiation of proceedings before a tribunal. According to this construction the workman must give notice of the accident to the employer and then go straight to the tribunal to enforce his claim. The Act does not say this: if it had meant this it would have been natural to say that "proceedings for the recovery of compensation shall not be maintainable unless the proceedings have been brought within six months." Instead of that the Act says "unless the claim for compensation has been made within six months." The object of the Act was to avoid compulsory proceedings and technicalities of every kind, and bring the parties to a friendly arrangement. That result will be much more likely if no legal proceedings are taken and no lawyers employed. If proceedings ever become necessary the notice of claim for compensation is the first step in the proceedings, the initiation. Unfortunately the Act is so drawn that nothing is clear: almost anything is arguable: but there are provisions which seem inconsistent with the construction adopted by the Court of Appeal: e.g. s. 1 sub-ss. 3, 4, and there is nothing in either of the schedules to the Act or in the Workmen's Compensation Rules 1898 and forms which makes against the construction now submitted. By rule 24 the applicant's request for arbitration shall be deemed to be a summons with particulars annexed, and by rule 64 where anything is not specially provided for under the rules the same procedure and provisions shall apply as under the County Courts Act 1888 and the rules thereunder. There can be no arbitration until there is a dispute, and there can be no dispute until a claim for compensation has been

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made. The view now contended for is very forcibly put in the judgment of Romer L.J.

C. A. Russell Q.C. and *Bertram* (*Ruegg Q.C.* with them) for the respondents. The request for an arbitration was out of time, not having been made within six months from the accident. Sect. 1 sub-s. 4 of the Act is as clear as anything in this Act can be, for it speaks of "the time hereafter in this Act limited for" what? Not for making a claim or the claim for compensation, but for "taking proceedings," that is for applying to a tribunal which can entertain proceedings and determine the matter in dispute. The elaborate if obscure provisions in the second schedule as to the tribunal shew that formal proceedings before some tribunal are of the first importance. Sect. 2 of the second schedule provides for what shall happen if the committee fail to settle the matter "within three months from the date of the claim." That must surely mean (if anything in this Act has a meaning) within three months after a claim made to or before the committee. It cannot mean within three months of the notice of claim sent to an employer, for the committee might hear nothing of such a notice and not have the opportunity of settling the matter. The time limited by this Act, six months, for making the claim corresponds to the time limited by the Employers' Liability Act 1880 s. 4 for taking proceedings, and the same effect was probably intended. If the notice of claim is the one important document, the equivalent to issuing a writ or plaint, it is strange that the Act makes no provision for serving it on the employer, while minute provisions are made for serving the notice of injury: see s. 2, sub-ss. 2–5. If the construction adopted by the appellant is the right one, a workman may give his employer notice of his claim and delay for any number of years to bring the matter before a tribunal. The construction adopted by the Court of Appeal has the support of a decision in Scotland, *Bennett* v. *Wordie & Co.* (1), and a decision of the recorder of Belfast, said to have been unanimously affirmed by the Irish Court of Appeal, *Marno* v. *Workman, Clark & Co.* (2)

(1) (1899) 1 F. Ct. Sess. Cas. 5th Series, 855.

(2) (1899) 33 Ir. L. Times Rep. 183; and see [1899] 2 Q. B. 149, n.

Sir R. T. Reid Q.C. in reply. In neither of those cases was there a real or sufficient claim for compensation made by the workman and the judicial observations upon the Act are obiter dicta. If the workman after making his claim for compensation unduly delays to take proceedings the employer can bring him to the point by applying for an arbitration.

The House took time for consideration.

June 26. EARL OF HALSBURY L.C. My Lords, the question which arises in this case, though it lies within a very narrow compass, is one of very great importance with reference to the administration of the Act in question. I think the whole of the question may be stated very shortly by reading, first, the sub-section upon which this case depends, and, secondly, the "notice of claim" which is alleged to have been given in pursuance of it.

The statute enacts, by sub-s. 1 of s. 2, that "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury. . . . "

My Lords, in pursuance, or intended pursuance, of that section the person injured in this case served upon the employer what is alleged to have been a "Notice of Claim"; and I pause for a moment to say, with all respect to Sir Robert Reid, that nothing very much turns upon the service or upon the person upon whom it was served, although in this case there is no doubt that it was served upon the person alleged to be liable. This was the "Notice of Claim": "To the Main Colliery Company, Limited, Skewen. Take notice that I claim the sum of 15*s.* per week from the fourth day of January 1899 until such date as I shall be able to resume work, as compensation for injuries received by me on the twenty-first day of December 1898 at your colliery at Bryncoch. William Powell."

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Now, my Lords, for the moment I will compare what the statute insists upon as a condition precedent to the maintenance of any right to compensation, and the thing that was done in alleged pursuance of it. The words are, "Unless the claim for compensation with respect to such accident has been made within six months." The written notice that was served —I call it a "notice," to use a neutral term for the moment—was in these terms: "I claim the sum of 15*s.* per week from the fourth day of January 1899 until such date as I shall be able to resume work." I suppose no one could reasonably doubt, unless he is forced by some circumstances extrinsic to the actual words under construction, that this was a "claim for compensation"; and it is not denied that it was made within the period limited by the Act. It was also made by the person who was alleged to have suffered, and it was served upon the person who was alleged to be liable; and the "claim" so stated and described in the written paper was made for a definite amount in respect of an accident described by its date; and, as I say, I should think no person, unless forced to give an artificial meaning to the words of the section which I have read, could doubt that it was a "claim for compensation." It purports on the face of it to be a "claim for compensation" under the Act.

Now the sole argument, so far as I can understand it, which is urged before your Lordships is that the "claim for compensation" must be a claim in some form of legal procedure. That is the proposition. I think it may be conceded that, dealing with lawyers under the ordinary course of procedure, it would be true to say that "taking proceedings" generally among lawyers would be understood to mean some form of known legal procedure. That, I think, must be conceded. But what then? This is not the ordinary course of legal procedure. It has been admitted by all the learned judges, I think, who have taken a different view from that which I propose to place before your Lordships for acceptance, that the word "proceedings" is used in a sense different from that which would describe legal procedure ordinarily. It is said it is used in this statute in different senses. That is another head of inquiry

upon which I will say a word presently, but I pass it by at this initial stage of the proceedings. Indeed, I observe I have inadvertently used the word "proceedings" myself in a meaning totally different from the ordinary meaning of the course of legal procedure. The argument of those who insist upon the opposite construction appears to me to involve of necessity two propositions: first, that you must find in the statute something to justify you in using these words in an artificial and non-natural sense; or, secondly, you must assume that when the Legislature used the phrase "claim for compensation" you must add by construction these words, "in some form of legal procedure."

My Lords, I entirely repudiate the necessity for doing either of those things. I do not find in the rest of the statute anything that can properly describe the expression "claim for compensation" as being technical in its application, and certainly I am not going to add words which I think in my own mind would be inappropriate to the subject-matter; but it is enough to say that the necessity is to add some words. Now it certainly is a very familiar rule of construction that you have no right to add words to a statute unless the exigency of the rest of the statute which you are construing renders it necessary for you to do so. My Lords, upon that short ground I am of opinion that the judgment of the Court below was wrong, and that the judgment of the dissenting judge was right, and I shall presently move your Lordships that the judgment of the county court judge be restored.

But, my Lords, I wish to say something, apart from the mere words, upon the whole of the statute itself. It appears to me that the statute deliberately and designedly avoided anything like technology. I should judge from the language and the mode in which the statute has been enacted that it contemplated what would be a horror to the mind of a lawyer, namely, that there should not be any lawyers employed at all, and that the man who was injured should be able to go himself and say, "I claim so much," and that then he should go to the county court judge and say, "Now please to hear this case, because my employer will not give me what I have claimed."

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It appears to me that that is the meaning and construction of the whole statute, and that is what the Legislature intended, and that is the reason why it avoided any technical phrases. It strikes one at once that, if anything which to a lawyer's mind would be in the nature of a technical application or a technical commencement of the litigation was intended, the Legislature was competent, and had sufficient knowledge to say what it meant. Why is it that there is no suggestion here of "plaint," "suit," "writ," "bill," or any other proceeding in the form of claim, such as is recognised as a statement of claim? Nothing of the sort is to be found in the whole of the statute, and even as to that which is now pointed out in the pressure of the argument by the learned counsel on the other side, namely, the application to a county court judge for a hearing, what is the meaning of the word "application"? Are the parties at issue or not? Has any litigation arisen? Is there a "dispute" in the language of the statute which has commenced? If so, there is no technical phraseology by which the initiation of that dispute is pointed to, and it appears to me to be exactly in accordance with what I have suggested to be the real meaning of the statute, that when once the claim for compensation has been made, and made upon the person who is alleged to be liable in respect of it, then the matter is either by agreement or by the operation of the statute itself remitted to the arbitrator.

Then an argument was suggested to your Lordships that there is no mode of procedure here for a defendant who wants to get rid of the question and to have it settled. I entirely differ. If it is meant that there is no mode actually pointed out by the statute, I agree; but it is left to the ordinary law in that respect, and I have never heard yet that a defendant cannot apply to an arbitrator for an appointment to have settled a question which has arisen between himself and his co-litigant. It has happened to me before now, and I daresay to all of your Lordships who have sat as arbitrators, that if a plaintiff has been found shilly-shallying and declining to go on, an appointment has been applied for; and I daresay it has happened to most of your Lordships in that event to give a

peremptory appointment for such and such a day, and to say that you would go on in the absence of the plaintiff unless he appears. Why is not that procedure applicable to this matter?

I observe that my learned brother, A. L. Smith L.J., points out that such and such a provision was made for the benefit of the man or for the benefit of the employer. My Lords, I absolutely repudiate any obligation to look at these things at all in that spirit. We are not here considering what is inserted in a contract for the benefit of one party to it or the other so that that party may get the benefit of it. We are here considering an Act of Parliament which itself prescribes what is to be done, and I absolutely repudiate any notion that you can by agreement or anything else, except so far as the statute itself gives power to agree, qualify the language of the statute itself. The statute says that if you have a claim you shall make that claim within six months, and so on. My Lords, under those circumstances, it appears to me, with great respect to both the learned Lords Justices A. L. Smith and Collins, that they have allowed themselves to be swayed by considerations which seem to me to be outside the Act of Parliament.

I observe that Smith L.J. speaks of agreeing with two decisions to which reference has been made, one in Scotland and the other in Ireland. Notwithstanding what I have said, I entirely agree with both those decisions. It appears to me that in neither the one case nor in the other is there any compliance with that which undoubtedly is a condition precedent to the maintenance of a claim for compensation—that a "claim for compensation with respect to such accident" has been "made within six months." But why? Not because there was no legal procedure, not because there was nothing which could technically be called the beginning of an action, but because there was no claim at all. In the Irish case there was absolutely no claim, and in the Scottish case the reason for the decision and what the Court decided was that in their view there was no "claim for compensation," not that it was not part of a legal proceeding.

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My Lords, as I have said, this is a very important case, but undoubtedly it is one which lies in a very narrow compass, and for the reasons which I have given it appears to me that the judgment of the county court judge ought to be restored and this appeal allowed, and I move your Lordships accordingly.

LORD MORRIS. My Lords, I am unable to concur with the motion made by the Lord Chancellor as, in my opinion, the judgment of the Court of Appeal should be affirmed, and I concur substantially in the reasons given by A. L. Smith and Collins L.JJ. The question is a narrow one, namely, what is the interpretation of the words "*the* claim for compensation" in the first sub-section of the second section of the Workmen's Compensation Act of 1897. The appellant contends that the words are satisfied by the service of "the claim for compensation" delivered to the respondents on May 2, 1899. The respondents contend that the words "*the* claim for compensation" mean the initiation of proceedings by the request for arbitration and claim for compensation filed in the county court of Glamorganshire in October 1899.

While the Employers' Liability Act of 1880 extended the liability of employers, yet the liability was founded on the negligence of the employer, actual or constructive. The liability of the employer under the Workmen's Compensation Act of 1897 becomes that of an insurer against accident to the workman. The Employers' Liability Act made provision for the service of notice of the injury by the workman and limited the right to bring an action to the period of six months from the time of the injury. It would be indeed strange that the Workmen's Compensation Act, which revolutionised the liability of the employer, should not also impose a limit for taking proceedings, and that it is still open to the injured workman to proceed under the Employers' Liability Act independently of the Workmen's Compensation Act. Sect. 1 sub-s. 4 enacts "if within the time hereafter in this Act limited for taking proceedings"; the only limitation of time to answer that is the expression "the claim for compensation" in s. 2 sub-s. 1, with

its limitation of six months. That section enacts (similarly to the Employers' Liability Act) as a condition precedent to the maintenance of proceedings that notice must be given to the employer of the accident happening, and further enacts that "*the* claim for compensation" must be made within six months from the occurrence of the accident. There was not to be and could not be an action, as the tribunals were only a reference to a somewhat mythical body called a representative committee, or to an agreed arbitrator, or to the county court judge as an arbitrator, which latter was resorted to in the present case by the "request for arbitration with respect to the compensation payable" which was lodged on October 2, 1899, much beyond the period of six months from the date of the accident. In my opinion that claim for compensation takes the place of an action under the Employers' Liability Act, and there must be some proceeding initiated before the expiration of six months before the representative committee, if such a body existed, or an agreed arbitrator, or the county court judge as an arbitrator. The words "the claim for compensation" are necessarily substituted for the "action" in the Employers' Liability Act—while s. 2 sub-s. 1 follows that Act in requiring notice of the accident, though the limitation of time is not necessarily the same. The words used are "*the* claim," not "*a* claim," for compensation. Now, if these words are satisfied by the workman merely serving a notice on the employer that he claims a certain amount as compensation, and he does not proceed to give seisin to any tribunal of his claim to be disposed of according to law, it follows that it remains open for any period of time—that the claim remains hanging over the employer with a right to the workman to take proceedings against him to the most remote period of time, not even limited by the Statute of Limitations. That the employer may initiate proceedings against himself appears to me an unmeaning and futile contention. Again, sub-ss. 2, 3, 4, and 5 of s. 2 give elaborate provisions as to what the notice of the injury is to contain and of the mode of service or delivery of it to the employer; there is no reference whatever to what "*the* claim for compensation" is to contain, or as to the mode of service

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or delivery of it. That appears to me conclusive that "*the* claim for compensation" cannot refer to any document to be served on the employer, but must refer to some document appealing to a tribunal. The Legislature intended to, and did, place a limit on the initiation of proceedings under the Act before the tribunals, or some or one of them, provided by the Act, and it did so in a way corresponding to the limit under the Employers' Liability Act.

I am of opinion the Court of Appeal rightly interpreted s. 2, sub-s. 1.

LORD SHAND. My Lords, I am of opinion that, as has been moved by the Lord Chancellor, the decision of the Court of Appeal in this case should be reversed, and that the award granted by the arbitrator, that is to say, the county court judge, should receive effect.

There is no objection here, as it has been stated there was in certain cases which were cited in the argument, which affected the judgments in those cases, that the claim is defective owing to a want of necessary specification. In those cases, as has been observed by the Lord Chancellor, there really was no claim; there was an attempt to make a claim, but it failed entirely in not providing the necessary specification to let the person against whom the claim was made know what the claim was. In this case the claim is specific, the parties are mentioned, the sum demanded is mentioned, and the date of the accident is mentioned. It is therefore quite distinguishable from either the Scottish or the Irish case in that respect.

That being so, it is clear, I think, that there is a complete and valid statutory claim to begin with. That claim was made within six months of the occurrence of the accident, and I am of opinion with his Lordship that though the case is undoubtedly one of difficulty, as we see from the difference of opinion which has arisen in the Courts below, the claim is sustained, and in my opinion forms the first step of the "proceedings" mentioned in s. 1, sub-s. 4. Having been taken within six months of the accident, it follows that the

"proceedings" were taken within the time required by the statute.

My Lords, I do not think it is necessary to go in detail into the reasons upon which I rest that judgment, but I agree entirely with what has been said by the Lord Chancellor and by Romer L.J. in his observations on the case in the Court of of Appeal. I may say, however, that it appears to me that the argument in favour of holding the claim to be the first step in the "proceedings" is very much fortified by what we find in the second schedule of the Act. In the first paragraph in that schedule there is a provision that "unless either party objects by notice in writing sent to the other party before the" representative committee having power to deal with questions of this kind has taken it up at all, it must be settled by arbitration. It appears to me that the claim was quite sufficient to enable that committee to take up the matter and settle it, even although no action had been raised.

My Lords, I must further add that the second paragraph of that schedule to which I have referred seems to me also to fortify the judgment. It is there provided that, if either party objects to the committee or the committee fail to take it up within a certain time, "the matter shall be settled by a single arbitrator agreed on by the parties." What is "the matter" that is to be settled? My Lords, it appears to me that it is the matter raised by the claim. The schedule does not say than an action is necessary in order to bring this provision of the schedule into operation.

I am of opinion, therefore, upon the statute and taking the statute as a whole, although, as I have said, I think the question is certainly very far from being free from difficulty, that the claim is a part of the "proceedings" referred to in the section upon which my noble and learned friend Lord Morris has founded his judgment.

I am also of opinion with the Lord Chancellor that, after a claim in valid form has been intimated by the workman to the employer, should the workman delay, it might be for an unreasonable or indefinite time, to initiate arbitration proceedings, the master would be entitled to do so, to the effect of

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demanding that the claim should be dismissed as being unfounded, although such a case does not seem to have been expressly provided for by the rules.

LORD DAVEY. I agree in the motion which has been proposed by my noble and learned friend on the Woolsack. I find the reasons for my judgment fully and clearly stated in the judgment of the dissentient judge in the Court of Appeal, Romer L.J., and I do not find that I can usefully add anything to that judgment. I will therefore take the liberty of adopting as my own the reasons stated by that learned Lord Justice without repeating them.

LORD BRAMPTON. My Lords, on December 21, 1898, the appellant, in the course of his employment as a workman at the colliery of the respondents, sustained serious bodily injury by an accident in respect of which he was entitled to compensation under the Workmen's Compensation Act 1897, which required by s. 1 sub-s. 3 that the liability of the employer to pay such compensation, and the amount or duration thereof, should if not settled by agreement be determined by arbitration. The second schedule to the Act provided that the arbitration tribunal should be either a committee, representative of an employer and his workman, or an arbitrator agreed on by the parties or, in the absence of such agreement, the county court judge. [His Lordship read s. 2 sub-s. 1 of the Act, and stated the notice of accident and the notice of claim before set forth.] The giving of this notice of the accident entitled the respondents to require the appellant to submit himself for examination to a qualified medical practitioner, and, if the appellant refused to do so, proceeding under the Act was suspended until such examination took place: see 1st schedule, s. 1, sub-s. 3.

With the notice of the accident, the claim, and the power to examine the appellant by a medical practitioner, the respondents had every opportunity that could be afforded them of forming an opinion as to the legality and reasonableness of the claim, and offering compensation to the appellant, which offer, if the

appellant thought fit to accept it, would at once have terminated the claim by agreement, and obviated the necessity of any arbitration at all. No agreement, however, was come to, for the respondents repudiated their liability, and thereupon questions arose between the parties which could only be settled by an arbitration under the statute. Accordingly, on October 2, under rule 8 of the Workmen's Compensation Rules, the appellant filed with the registrar of the county court at Neath a request for arbitration, which, according to the same rule, was entered and numbered as a plaint, and was the initiative act of the proceedings instituted *to recover* the compensation claimed. Appended to that request were particulars as required by rule 9. A copy of this request with such particulars was duly sent by the registrar of the Court to the respondents with a notice that the judge as arbitrator would hear the case on the 27th of that month. Before that day, namely, on October 19, the respondents filed with the registrar their answer, alleging that the appellant's claim for compensation was barred, not having been made within six months from the occurrence of the accident. On October 27, before the judge, this objection was urged as a defence; it was, however, overruled by the judge, who then heard the case on its merits and made his award in favour of the appellant. An appeal was made to the Court of Appeal against that decision, which was reversed by a majority of the Lords Justices, whose judgment is the subject of this appeal to your Lordships' House. I am of opinion that this appeal should be allowed.

There is no warrant for even a suggestion that a limit is expressly put by the statute upon the time within which arbitration proceedings must be commenced, unless it be found in s. 2 sub-s. 1 of the Act, the material words of which I have already quoted. I must assume that the framer of that sub-section intended in it to express, in that "ordinary language" which he has in the following sub-s. 2 enjoined an injured workman to use in preparing his notice of injury, that which, reading this sub-section alone for his guide, every ordinary intelligent person would understand from the language he has employed. And I cannot raise in my own mind a doubt that

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any such person could from that language come only to one conclusion, namely, that a workman, in giving the notice of injury and making his claim for compensation upon his employers within six months, has fulfilled every obligation imposed upon him by that sub-section. If it was intended that it should be interpreted as the respondents contend, I can only say that more misleading language could not have been employed.

But it is said that the opening words of s. 1 sub-s. 4, "If within the time hereinafter in this Act limited for taking proceedings," point to a limit of time for initiating proceedings for arbitration, and must be read in conjunction with s. 2 sub-s. 1. Even so reading it, I do not think they could affect the plain phraseology of that sub-section, which in my opinion, though it points to arbitration proceedings by the words "proceedings for the recovery," by the remaining words points out only the preliminary proceedings which are made conditions precedent to the right to call in aid the statutory arbitrator. I think the Legislature in the use of the word "proceedings" in ss. 1 and 2 employed it in different senses. In s. 1 the expression is "if any *question arises in any proceedings* under this Act." In s. 2 the expression is "proceedings *for the recovery* under this Act of *compensation*." Now, bearing in mind that no *arbitration* proceedings can be claimed or taken unless a *question* has arisen in some proceedings under the Act, and that the proceedings in which such question must arise must therefore of necessity be before the arbitration is initiated, and that the only proceedings pointed to by the Act before arbitration are those consisting of the statutory notice of injury and the claim for compensation and such requisition as may ensue therefrom until an agreement is hopeless, it must be to such proceedings that s. 1 sub-s. 3 refers. "Proceedings *for the recovery* of compensation" are applicable to arbitration proceedings which are taken with the object of obtaining an award under which payment may be enforced, and which in its effect and operation is analogous to a judgment recovered, and are inapplicable to preliminary proceedings which are taken only with a view to bring about an amicable agreement if possible, or pave the way

to arbitration proceedings which are in their nature of a judicial and hostile character. One may well interpret these sections to a workman injured in popular language thus: "If you desire compensation, give notice of your injury as speedily as you can, and send in your claim within six months; try to agree with your employer, but if you fail to do so, you may then enforce your right to compensation by arbitration, but you will not be entitled to an arbitration or to insist upon compensation unless you have given your notice and claim as the statute directs you to do."

I have formed this opinion regardless of the observations made in the Court of Appeal and in this House as to the probable intentions of the Legislature to fix a limit of time within which arbitration proceedings shall be commenced, analogous to that fixed under the Employers' Liability Act with regard to actions. I am content to say that if such were the intentions of the Legislature they have not been expressed in this Act of Parliament. I equally disregard all the arguments as to alleged hardships which would be inflicted upon employers by admitting the possibility that threatened proceedings may vexatiously be allowed to hang too long over their heads, and I may add I am not satisfied that employers may not themselves initiate the proceedings by arbitration if they desire to do so; but this House is not called upon to decide that question to-day.

I deal only with the matter calling for your Lordships' judgment, and regarding that I have only to express my opinion that the judgment of the Court of Appeal should be reversed, and the award of the county court judge restored with costs.

LORD ROBERTSON. My Lords, I am clearly of opinion that the appellant is right.

The proceedings contemplated by the Act of 1897 for the settlement of claims are not primarily judicial proceedings; and the error of the respondents arises from overlooking this distinctive characteristic of the Act. Arbitration may be required to decide differences arising in the proceedings; but,

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if this occurs, it is only incidental to the proceedings, and is not contemplated as a necessary part of them. Once this is realized, it becomes clear that the proper initiation of the proceedings is not an appeal to arbitration, but is exactly such a claim as that which was sent to the respondents.

I have only to add that the most plausible argument against the appellant, namely, that on his theory there would be no check on delay, is not supported by the statute. As soon as the claim is sent to the employer, he can, if he disputes it, himself take the difference to arbitration and have it settled. The frame of the rules cannot possibly take away this right, which arises under the statute.

Order of the Court of Appeal reversed and award of the county court judge restored with costs here and below. (1)

Solicitors: *Sharpe, Parker & Co., for Cuthbertson & Powell, Neath; H. P. Becher, for W. V. Symons, Pontypridd.*

(1) The order was not drawn up when this report went to press.

[HOUSE OF LORDS.]

GRANT . . . . . APPELLANT; H. L. (Sc.)
1900
AND
May 28.
LANGSTON (SURVEYOR OF TAXES) . . . RESPONDENT.

Revenue—Inhabited House Duties—Exemption in favour of Buildings occupied for Trade only—48 *Geo.* 3, *c.* 55, *Sched. B*, *r.* 3—57 *Geo.* 3, *c.* 25, *s.* 1—5 *Geo.* 4, *c.* 44, *s.* 4—*Customs and Inland Revenue Act*, 1878 (41 *&* 42 *Vict. c.* 15), *s.* 13, *sub-s.* 2.

By sub-s. 2 of s. 13 of the Customs and Inland Revenue Act, 1878, "Every house or tenement which is occupied solely for the purposes of any trade or business or of any profession or calling by which the occupier seeks a livelihood or profit shall be exempted from the duties (on inhabited houses) by the said commissioners upon proof of the facts to their satisfaction."

The appellant was the owner of a building of two storeys under one roof situate in Portobello, Edinburgh. The ground-floor was occupied by the appellant to carry on the trade of a licensed retailer of spirits, and was numbered 49, Bath Street. The upper storey was occupied by the appellant as his dwelling-house, and was numbered 47, Bath Street. Access to the dwelling-house was by a door opening from the public street and by a staircase from that door which led up to the upper storey. Access to the public-house was by a different door also opening from the street. There was no internal communication between the dwelling-house upon the upper storey and the public-house on the ground-floor:—

Held, reversing the decision of the First Division of the Court of Session, that the public-house was exempt from inhabited house duty, and that the duty ought to be confined to the value of that portion of the building used as a dwelling-house.

APPEAL from the First Division of the Court of Session, Scotland, sitting as a Court of Exchequer. (1)

F. W. Langston, surveyor of taxes, the respondent here, appealed to the Court of Session against a decision of the Income Tax Commissioners of the city of Edinburgh whereby the commissioners decided that John Grant, the appellant here, was not liable to inhabited house duty in respect of his business premises, No. 49, Bath Street, Portobello.

The case stated by the commissioners set out that Grant, licensed retailer of spirits, complained of an assessment of

(1) (1898) 25 R. 1040.

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3*l.* 5*s.* 6*d.*, being the inhabited house duty at the rate of 6*d.* in the pound on 131*l.*, the cumulo value of a dwelling-house and licensed premises situate in Bath Street, Portobello, and that Grant claimed that the licensed premises did not fall under duty, and that the duty should be confined to the value of that portion of the premises occupied as a dwelling-house. The following were the facts found and admitted :—

(1.) The premises in question consisted of a building of two storeys under one roof, of the whole of which the appellant was both owner and occupier.

(2.) The ground-floor, No. 49, Bath Street, was used by the appellant for the purpose of carrying on the trade of licensed retailer of spirits, and the upper storey, No. 47, Bath Street, was occupied by him as his dwelling-house. The terms of his public-house certificate, which was in the form of Sched. A, No. (2.), appended to the Public Houses (Scotland) Act, 1862, were that he was authorized and empowered to keep a public-house at No. 49, Bath Street, Portobello, ... for the sale in the said house, but not elsewhere, ... of spirits, wine, porter, ale . . . .

(3.) The only access to the dwelling-house was by the door opening from the street No. 47, Bath Street to the staircase leading to the upper storey, and for the appellant to enter his licensed premises from his dwelling-house he had to descend the stair, come into the public street, and enter by the public door No. 49, Bath Street.

(4.) The dwelling-house was not included in the premises licensed for the sale of excisable liquors, and they were separately entered in the valuation roll of the city of Edinburgh, the annual value of the house being entered as 33*l.*, and of the licensed premises as 98*l.*

(5.) The licensed premises were formerly occupied by a tenant who was not tenant or occupier of the dwelling-house. No person resided in the licensed premises, as the magistrates of Edinburgh, being the licensing authority within whose jurisdiction Grant's house is situate, have made it an unwritten condition that Grant should not reside in his licensed premises.

The First Division of the Court of Session, reversing the

decision of the commissioners, held that the case was governed by *Scottish Widows' Fund* v. *Inland Revenue* (1) and *Glasgow and South Western Ry. Co.* v. *Banks* (2), and that the appellant was liable on the cumulo value of the dwelling-house and licensed premises, and that the duty ought not to be confined to that portion of the premises occupied as the dwelling-house.

The Lord President and the rest of the judges said they found it impossible to resist the result of the above cases, but added that their decision was not to be held as adding any new or independent affirmance of the reasoning upon which those decisions depended.

March 29. *Asquith*, *Q.C.*, and *F. T. Cooper* (the latter of the Scottish Bar), for the appellant. The licensed premises, No. 49, Bath Street, are not a shop or warehouse within the meaning of rule 3 (3) appended to Sched. B of 48 Geo. 3, c. 55, and they are not within the meaning of the said rule attached

(1) (1880) 7 R. 491; 1 T. Cas. 247.

(2) (1880) 7 R. 1161; 1 T. Cas. 325.

(3) Duties on Inhabited Dwelling-houses. Rule 3 of Sched. B of 48 Geo. 3, c. 55 (1808), enacted that "All shops and warehouses which are attached to the dwelling-house or have any communication therewith shall, in charging the said duties, be valued together with the dwelling-house and the household and other offices aforesaid thereunto belonging (except such warehouses and buildings upon or near adjoining to wharfs which are occupied by persons who carry on the business of wharfingers, and who have dwelling-houses upon the said wharfs for the residence of themselves or servants employed upon the said wharfs): And also except such warehouses as are distinct and separate buildings and not parts or parcels of such dwelling-houses or the shops attached thereto, but employed solely for the purpose of lodging goods, wares and merchandise, or for carrying on some manufacture (notwithstanding the same may adjoin to or have communication with the dwelling-house or shops)."

Rule 6: "Where any house shall be let in different storeys, tenements, lodgings, or landings and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to and shall in like manner be charged to the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling-house and shall be charged to the said duties: Provided that where the landlord shall not reside within the limits of the collector or the same shall remain unpaid by such landlord for the space of twenty days after the same is due, the duties so charged may be levied on the occupier or occupiers respectively, and such payments shall be deducted and allowed out of the next payment on account of rent."

Rule 14: "Where any dwelling-house shall be divided into different tenements being distinct properties,

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to the dwelling-house above, and have no communication—that is private internal communication—therewith. Further, if the building in which the licensed premises are situate does fall within the description of a dwelling-house, then the building is divided into different tenements being distinct properties. Further, the appellant is exempt from inhabited house duty on the licensed premises by 57 Geo. 3, c. 25, s. 1 (1), in respect that the licensed premises are a distinct tenement or building, or part of a tenement or building, occupied by him for the purposes of trade only, no person dwelling or residing therein except in the daytime only, and for the purposes of such trade:

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every such tenement shall be subject to the same duties as if the same was an entire house, which duty shall be paid by the occupiers thereof respectively."

(1) The Act 57 Geo. 3, c. 25 (1817), after citing the Act of 48 Geo. 3, c. 55, and the Scheds. A and B thereto, continued as follows: "And whereas it is become usual in cities and large towns and other places for one and the same person, or for each person where two or more persons are in partnership, to occupy a dwelling-house or dwelling-houses for their residence, and at the same time one or more separate and distinct tenements or buildings, or parts of tenements or buildings, for the purposes of trade or as warehouses for lodging goods, wares, or merchandise therein, or as shops or counting-houses, and to abide therein in the daytime only for the purposes of such trades respectively which have been charged with the said recited duties, although no person shall inhabit or dwell therein in the night-time, and it is expedient in such cases to exempt from the said duties such tenements or buildings, or parts of tenements or buildings, as are or shall be solely employed for the purposes herein mentioned." "Be it therefore enacted by, &c., that from and after April 5, 1817, on due proof made in the manner herein directed, to the satisfaction of the respective commissioners acting in the execution of the said recited Act, that any person or any number of persons in partnership together respectively occupy a tenement or building, or part of a tenement or building, which shall have previously been occupied for the purpose of residence wholly as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, no person inhabiting, dwelling, or abiding therein, except in the daytime only for the purpose of such trade, such person or each of such persons in partnership respectively residing in a separate and distinct dwelling-house, or part of a dwelling-house, charged to the duties under the said Act, it shall be lawful for the said commsssioners, according to the provisions of this Act to discharge the assessment made for that year in respect of such tenement or building which shall be so used for the purposes of trade, or so employed as a warehouse, for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, anything in the said Act to the contrary notwithstanding."

see also 5 Geo. 4, c. 44, s. 4. (1) Nor are the licensed premises a dwelling-house within 14 & 15 Vict. c. 36. See also 30 & 31 Vict. c. 90, s. 25 (2); 32 & 33 Vict. c. 14, s. 11. (3) Again, s. 13, sub-s. 2 (4), of the Customs and Inland Revenue Act,

(1) 5 Geo. 4, c. 44, s. 4, enacted, whereas, by an Act passed in the 57 Geo. 3, "Provision is made for granting exemption to persons in trade from the duties on houses, windows, and lights and on inhabited houses in respect of houses, tenements, or buildings, or parts of tenements or buildings, used solely by such persons for the purposes of trade, such persons respectively residing in a separate house and distinct dwelling-house, or part of a dwelling-house, charged to the said duties as in the said Act described: And whereas it is expedient to extend the said exemptions to the cases herein mentioned. Be it further enacted that upon all assessments to be made for any year commencing from and after April 5, 1824, the provisions in the said Act contained for granting exemptions from the said duties to persons in trade in respect of houses, tenements, or buildings in the said Act described shall and may be extended and applied by the respective commissioners and officers acting in the execution of the said Act and of this Act on due proof to all and every person or any number of persons in partnership together for and in respect of any house, tenement, or building, or part of a tenement or building, in the said Act described which shall be used by such person or persons as offices or counting-houses for the purpose of exercising or carrying on any profession, vocation, business, or calling by which such person or persons shall seek a livelihood or profit, no person inhabiting, dwelling, or abiding therein except in the daytime only for the purpose of such profession, vocation, business, or calling, such person or each such persons in partnership respectively residing in a distinct and separate dwelling-house, or part of the dwelling-house, charged to the said duties. . . . and the said exemptions hereby authorized shall be claimed and allowed on due proof."

(2) 30 & 31 Vict. c. 90, s. 25, provided that "from and after April 5, 1867, in order to entitle the occupier of any tenement or building, or part of a tenement or building, to exemption from inhabited house duties on the ground of such premises being occupied as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, or being used as offices or counting-house, it shall not be necessary to prove nor shall proof be required that such occupier resides in a separate and distinct dwelling-house or part of a dwelling-house charged with the said duties."

(3) 32 & 33 Vict. c. 14, s. 11, provided that "from and after April 5, 1869, any tenement or part of a tenement occupied as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, or being used as a shop or counting-house, shall be exempt from inhabited house duties, although a servant or other person may dwell in such tenement or part of a tenement for the protection thereof."

(4) 41 & 42 Vict. c. 15, s. 13, sub-s. 1, enacts, "Where any house being

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1878, is directly applicable to this case; and even if the case fell under 48 Geo. 3, c. 55, Sched. B, r. 3, the Legislature says there is to be an exemption in such a case as this.

In England the decisions are in favour of the appellant: see *Chapman* v. *Royal Bank of Scotland.* (1) The cases followed by the Court of Session—but not with much confidence—were *Scottish Widows' Fund* v. *Inland Revenue* (2) and *Glasgow and South Western Ry. Co.* v. *Banks* (3); but the law laid down in these cases is contrary to that decided in the first-mentioned case.

[They also cited *Campbell* v. *Inland Revenue* (4); *Russell* v. *Coutts* (5); *Corke* v. *Brims* (6); *Allan* v. *Miller.* (7)]

Sir R. E. Webster, A.-G., and *A. Graham Murray, L.A.* (with them *A. J. Young*), (the two latter of the Scottish Bar), for the respondent. It is admitted that this is a building under one roof; it is not therefore a case where there are party walls

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one property shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be at liberty to give notice in writing at any time during the year of assessment to the surveyor of taxes for the parish or place in which the house is situate, stating therein the facts, and after the receipt of such notice by the surveyor the commissioners acting in the execution of the Acts relating to the inhabited house duties shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should in their opinion have been assessed, if it had been a house comprising only the tenements other than such as are occupied as aforesaid or are unoccupied."

Sub-s. 2: "Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempt from the duties by the said commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof."

Sub-s. 3, "s. 11, of 32 & 33 Vict. c. 14, shall be and is hereby repealed."

(1) (1881) 7 Q. B. D. 136; 1 T. Cas. 363.

(2) 7 R. 491; 1 T. Cas. 247.

(3) 7 R. 1161; 1 T. Cas. 325.

(4) (1879) 7 R. 82; 1 T. Cas. 234.

(5) (1881) 9 R. 261, 265; 1 T. Cas. 469.

(6) (1883) 10 R. 1128; 1 T. Cas. 531.

(7) (1889) 16 R. 557, 558; 2 T. Cas. 446.

between two houses, and the fact that two separate tenements are used for different occupations is not enough to obtain exemption. If in the sense of the Act of 48 Geo. 3, c. 55, Sched. B, a dwelling-house with a shop attached forms one inhabited house, the owner as occupier is liable for duty on the annual value of the whole premises. The house and shop are not to be separately assessed, but are taxable as one entire and distinct building. The fact that a man has decided to use one floor of his house as a shop and the upper storey as a dwelling-house does not relieve him from inhabited house duty in respect of the shop, for the commissioners are entitled in the first place to look at the four walls of the house and decide that it is a dwelling-house as a whole. The appellant cannot rely on the exemption introduced by 57 Geo. 3, c. 25; 5 Geo. 4, c. 44; or 41 & 42 Vict. c. 15, s. 13. What was previously taxed by 48 Geo. 3, c. 55, was a dwelling-house the subject of distinct ownership, and the tenements or parts of tenements exempted are such as were at the date of the Act assessable subjects by themselves. The "tenement" chargeable here under Sched. B, r. 3, 48 Geo. 3, c. 55, consists of the whole building. Nor can the appellant obtain any aid from 5 Geo. 4, c. 44, for the exemption in favour of trade provided by 57 Geo. 3, c. 25, was held to apply only to the warehouses of wholesale merchants and the shops of retail dealers. The object of 5 Geo. 4, s. 44, was simply to extend the exemption to business premises of a different kind, namely, to offices or counting-houses. Further, this case does not fall within sub-s. 1 of s. 13 of the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15). The hardship of the case of *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (1) was felt, and as a relief the Legislature decided for the purposes of inhabited house duty to treat all lettings in the house as the letting of the person who let off the house; and he was to be held to be the occupier of the whole house, but with the aid of this exemption he can obtain relief in respect of any such part of the house as is let out solely for business purposes. Then sub-s. 2 of s. 13 of the Customs and Inland Revenue Act,

(1) (1876) 1 Ex. D. 469.

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1878, is to be read with sub-s. 1, and is a further relief in respect of the same subject-matter—that is, if you have a separate house wholly occupied for trade, then you may have a reduction although you have a caretaker there, and this applies to rule 14, Sched. B, 48 Geo. 3, c. 55. An ordinary dwelling-house ought to be taxed unless it comes within the exemptions. In *Chapman* v. *Royal Bank of Scotland* (1) the house was structurally built so as to shew two distinct buildings; and there was a sub-letting of the upper part of the premises. That was a separate tenement within the terms of sub-s. 1 of s. 13 of 41 & 42 Vict. c. 15, and, therefore, the case is not in the appellant's favour.

This was a dwelling-house in part of which goods were exposed for sale, and, looking broadly at the Taxing Acts, there is nothing exempting rooms in a dwelling-house which the resident has thought fit to make accessible from the street only.

Cooper, in reply.

The House took time for consideration.

May 28. EARL OF HALSBURY L.C. My Lords, I think this is one out of many similar cases in which the difficulty of construction arises from an alteration in things which, notwithstanding alteration, retain their original names, while the Legislature in retaining the original name in a statute legislates by using words in a wholly artificial sense and without much regard to their original meaning.

A hundred years ago there was not much difficulty in saying what was a "house," but builders and architects have so altered the construction of houses, and the habits of people have so altered in relation to them, that the word "house" has acquired an artificial meaning, and the word is no longer the expression of a simple idea; but to ascertain its meaning one must understand the subject-matter with respect to which it is used in order to arrive at the sense in which it is employed in a statute.

With the most sincere respect for the authority of Sir George

(1) 7 Q. B. D. 136; 1 T. Cas. 363.

Jessel, I cannot help thinking that his reasoning in the *Westminster Case* (1) is unsatisfactory. No one will doubt the soundness of the maxim which he quotes as the basis of his judgment, but as usual it is the application of it which raises the difficulty. Indeed, I think it is true to say that the judgment to which I refer proves too much for the purpose of its final conclusion. It establishes undoubtedly that the word "house" is an ambiguous word; it shews that you must search otherwise than in the word itself what is the meaning in which the Legislature has used it, since the natural and ordinary meaning of an ambiguous word cannot be ascertained without the context. Now, the instances to which the learned judge referred, such as the two Temples constituting one house or houses, such as Christ Church, Oxford, have as little to do with structure, architecture, form of building, or occupation as with the complexion of the inhabitants. "House" in the sense thus referred to means simply a community, ecclesiastical or secular, having common revenues, common objects, and, in pre-Reformation times, vows or obligations common to those who joined it. Accordingly, the word "house" has no common or ordinary meaning so fixed and definite that by the mere use of the word you can determine in what sense the Legislature has used it.

I think the original idea of an inhabited house was that of a building inhabited by one person (with his family) responsible for the tax, who was himself the inhabitant of the whole of the house. But very soon questions began to be raised as to what constituted the unity of a house; one side of a whole street is in one sense structurally one building, but the separate unity of each of the structures with all its arrangements for occupation by one family and its head was of course recognised as a house separately liable to the tax. Even semi-detached houses were always recognised as two houses, although they were structurally one and protected by one roof; but controversies have arisen in respect of rating for the poor, for purposes of taxation and for the franchise, and decisions have been arrived at not always satisfactory or reconcilable with each

(1) 1 Ex. D. 469.

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other. An outer door and a common or separate staircase have been most commonly the tests applied, and I am not myself able to see how the case of chambers in an Inn of Court and the decision of the *Westminster Case* (1) are reconcilable with each other. But the Legislature went further, in respect of artificially creating more artificial houses than one out of a house which was in every ordinary sense one taxable house, by giving from time to time exemptions from taxation to parts of structures which were structures adapted and probably intended originally for the occupation of one inhabitant as head of a family. Sir George Jessel himself in *Yorkshire Fire and Life Insurance* v. *Clayton* (2) said: "In modern times a practice has grown up of putting separate houses one above the other; they are built in separate flats or houses"; but for all legal and ordinary purposes they are separate houses.

Now, it appears to me that, apart from the exemption created by the Act 41 & 42 Vict. c. 15, s. 13, I should have great difficulty in holding this building to be one inhabited house within the various alterations which the Legislature has introduced into what it has for fiscal purposes called a "house." It appears to me that in the language of Sir George Jessel there are two houses built one above the other. I suppose no one would dream of calling them one house if the same conditions which are found to exist here were found to exist in the same structures built side by side, and not one above the other, and, if it is possible to have one house built over another house, then all that has been held to constitute a separate house exists here: there is nothing which is held in common; the one structure is superposed upon the other, and that is all.

With respect to the exemption, I do not think what has been said by the Lord President in *Russell* v. *Coutts* (3) can be made clearer, that, in his own words, "the word 'tenement' in the statute means part of a house so structurally divided and separated as to be capable of being a distinct property or a distinct subject of lease." There is no doubt that if this is

(1) 1 Ex. D. 469. (2) (1881) 8 Q. B. D. 421.
(3) 9 R. 261, 265.

right, and I am by no means prepared to say it is wrong, the house which is here described is undoubtedly capable of being a separate property or separately leased, but I have more difficulty in seeing that it is structurally divided if I assume that the whole building is one house.

If, as some of your Lordships seem to think, the exemption was introduced so as to alter the law as it was declared to be in the *Westminster Case* (1), I cannot think it was very happily done. In this legislation the words "tenement," "attached," "property," all require definition. I am not sure that I know what is a tenement as applied to such a subject-matter, though, as I have said, I am not prepared to differ with the Lord President; nor is it perhaps very material to consider it further, since for the reasons I have given I think this—i.e., the ground-floor—house is not an "inhabited house" within the statute, and therefore I agree with your Lordships that this appeal should be allowed, and the decision of the commissioners restored.

LORD MACNAGHTEN. My Lords, I think the claim of the Crown cannot be sustained.

The question seems to me to depend entirely upon the true construction of sub-s. 2 of s. 13 of the Customs and Inland Revenue Act, 1878. The argument on behalf of the Crown, as I understood it, was that sub-s. 2 was to be treated for all practical purposes as part of sub-s. 1; that the purpose of sub-s. 2 in substance was to provide that in the case of premises used for professional purposes, as well as in the case of trade premises, the mere circumstance that a caretaker resided therein should not make the building liable to taxation as a dwelling-house, and that the effect of reading the two sub-sections together was to limit the application of sub-s. 2 to buildings chargeable as an entire house or divided into tenements being distinct properties.

I think the two sub-sections are quite independent, distinct in origin, and diverse in operation. The object of sub-s. 1 was to remedy the hardship exemplified in the case of the *Attorney-*

(1) 1 Ex. D. 469.

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General v. *Mutual Tontine Westminster Chambers Association.* (1) The association had erected blocks of buildings structurally divided into separate tenements or suites of apartments. Some had been let for residential purposes, some as offices or chambers, while others were still unlet. Under Rule VI. of the Act of 1808 the association was held to be chargeable as the occupier of these buildings, and liable for duty in respect of all the separate tenements or suites of apartments, whether let or unlet.

The evolution of sub-s. 2 was a more gradual process. It was marked by successive relaxations in favour of trade. Rule III. of the Act of 1808 provided that all shops which were attached to the dwelling-house or had any communication therewith should be valued with the dwelling-house. If that rule had remained unaltered, there could have been, according to the decided cases, no doubt as to the appellant's liability. The first change was made in 1817. The Act of that year (57 Geo. 3, c. 25, s. 1), takes note of the fact that it had become usual for tradesmen and shopkeepers to carry on their business in one house and to reside in another. It enacts that tenements or buildings, "or parts of tenements or buildings," previously occupied as dwelling-houses by persons who since had gone to reside in taxable dwelling-houses elsewhere, should be discharged from assessment when used wholly as houses for trade or as warehouses for goods, or as shops or counting-houses. The Act of 1824 (5 Geo. 4, c. 44) extended this exemption to persons using any house, tenement or building, "or part of a tenement or building," for the purpose of any profession, vocation, business, or calling by which they seek a livelihood or profit. A further concession was made in 1867. By s. 25 of the Inland Revenue Act of that year (30 & 31 Vict. c. 90) it was enacted that, in order to entitle the occupier of "any tenement or building, or part of a tenement or building," to exemption, on the ground of such premises being occupied for trade purposes only, it should not be necessary to prove, nor should proof be required, that such occupier resided in a separate and distinct dwelling-house, or part of a dwelling-

(1) 1 Ex. D. 469.

house chargeable with the said duties. Sect. 11 of the Inland Revenue Act, 1869 (32 & 33 Vict. c. 14), provided that "any tenement or part of a tenement" occupied as a house for the purposes of trade only should be exempt, although a caretaker dwelt in it for the sake of protection.

So far the relaxations in favour of trade introduced by the Acts of 1867 and 1869 had not been extended to premises used for professional purposes. But in 1878, when the Legislature dealt with the house tax for the purpose of remedying the hardship which occurred in the case of the Westminster Chambers Association, occasion was taken to put premises used for professional purposes precisely on the same footing as premises used for trade purposes; and s. 11 of the Act of 1869 was then repealed.

It is to be observed that while s. 11 of the Act of 1869 is repealed, s. 25 of the Act of 1867, though apparently superseded, is not repealed. Now, the Act of 1867, following the language of the earlier Acts, speaks of "any tenement or building, or part of a tenement or building." The Act of 1878, s. 13, sub-s. 2, uses the expression "house or tenement." I do not think that it could have been intended to cut down or narrow the concession introduced by the Act of 1867. The more compendious phraseology to be found in the Act of 1878 was, I suppose, adopted because the previous sub-section shews that the word "tenement" is used as meaning a division or part of a house.

In the present case it is not necessary to consider whether there must be a structural division or physical separation when exemption is claimed for part of a building as being used for trade or professional purposes only, because the two portions of the building belonging to the appellant are divided so completely that in fact they form separate houses. It is said they are not "distinct properties." That is true. But there is not in sub-s. 2 of s. 13 of the Act of 1878, any more than in s. 25 of the Act of 1867, anything requiring that, when a tenement or part of a house used for trade purposes only is a portion of a building the rest of which is used as a dwelling-house, the two portions must be "distinct properties" in order

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to enable the occupier of the trade premises to claim exemption. And certainly there is no reason why such a condition should be introduced, if it is not prescribed in terms by the enactment.

I am therefore of opinion that the claim of the appellant ought to be allowed. In coming to this conclusion your Lordships will not, I think, be differing from the opinion of the learned judges of the Court of Session, although in deference to previous rulings the actual decision was the other way.

My noble and learned friend Lord Morris desires me to express his concurrence.

LORD DAVEY. My Lords, if the question on this appeal depended only on the proper construction of the rules contained in Sched. B to the Act 48 Geo. 3, c. 55, I should have some difficulty (having regard to the cases already decided on these Acts both in England and in Scotland) in avoiding the conclusion that this entire building is liable to be assessed to the inhabited house duty as one dwelling-house. There is this difference between the circumstances of the case decided in the English Court of Appeal, *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (1), and the present one, namely, that in the *Westminster Case* (1) there was one door opening on the street, and one staircase common to the occupiers of all the suites of rooms into which the building was divided, whereas in the case before your Lordships each portion of the building has a separate entrance from the street, and no part of the building is used in common by the occupiers of the ground-floor and the first-floor. Whether that difference is sufficient to make any real distinction, or whether the decision in the *Westminster Case* (1) is entirely satisfactory, it is not necessary for me to say, because I think that whatever view may be taken of that decision this case falls within the exemption contained in sub-s. 2 of s. 13 of 41 & 42 Vict. c. 15. The 1st sub-section applies to a house being one property which is divided into and let in different tenements. Two conditions are required. It must be both divided into and also let

(1) 1 Ex. D. 469.

in different tenements. It has been decided in England that there must be a physical division of the house into different tenements, and that the word "tenement" is used in order to comprise the different kind of things (such as shops, warehouses, or offices) into which a house may be divided: *Yorkshire Fire and Life Insurance Co.* v. *Clayton* (1), and see *Chapman* v. *Royal Bank of Scotland.* (2) In the Scottish case of *Russell* v. *Coutts* (3) the Lord President says, "'Tenement' in this statute means a part of a house so structurally divided and separated as to be capable of being a distinct property or a distinct subject of lease"; and Lord Shand says: "The line must simply be drawn by looking at the particular premises and ascertaining whether they are so structurally shut off from the rest of the building occupied as to form an entirely separate tenement of themselves."

My Lords, I agree with this definition of the word "tenement" in this section of the Act, and I think it must have the same meaning in sub-s. 2 as it has in sub-s. 1. The 2nd sub-section exempts every "house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit"; and it also provides that the exemption shall take effect although a caretaker may dwell in such house or tenement. The words are perfectly general. There is nothing about letting. The owner may be the occupier of the tenement.

It was argued that the words "house or tenement" are used pleonastically, because it was said these are so used in a section of an earlier Act. But it is a sound rule of construction that you must give to each word used in an Act of Parliament its significance, if you can do so without violating other provisions of the Act. It was also said that the word "tenement" should be confined to the case where a tenement is separately assessable under rule 14 of 48 Geo. 3. I see no reason for cutting down the generality of the words in that manner. If that had been the intention it would have been

(1) 8 Q. B. D. 421. (2) 7 Q. B. D. 136.
(3) 9 R. 261.

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easy to have expressed it. No difficulty is suggested in applying the words of the sub-section according to their literal meaning, and I think that the Legislature intended to exempt from the tax every "tenement" (in the sense which that word bears in this section) used for the purposes of trade or business or professionally. This public-house is, in my opinion, clearly either a separate house, as some of your Lordships think, or a separate tenement within the meaning of the sub-section to which I have referred, and I therefore think it should be declared that it is exempted from the tax.

LORD BRAMPTON. My Lords, I also am of opinion that the tenement numbered 49, Bath Street, Portobello, in which the appellant carries on the trade or business of a licensed public-house under the Public Houses (Scotland) Act, 1862, is not liable to the duty imposed by the House Tax Act, 1851, to be assessed and levied according to the rules contained in Sched. B of the statute 48 Geo. 3, c. 55.

By s. 1 of the Act of 1851 it was enacted that in lieu of the duties then payable there should be assessed upon inhabited dwelling-houses throughout Great Britain the duties set forth in the schedule to that Act, with respect to which it was by s. 2 enacted that the rules contained in the Sched. B to the Act of 48 Geo. 3 should be in full force, as they were in regard to certain then already repealed duties.

By Rule III. of Sched. B all shops and warehouses which are attached to the dwelling-house, or have any communication therewith, shall, in charging the duties, be valued together with the dwelling-house.

The schedule to the Act of 1851 declared the duty of 6*d.* in the pound of the annual value to be payable for every inhabited dwelling-house which, with the household and other offices, &c., therewith occupied, is worth the annual rent of 20*l.* or upwards: "Where such dwelling-house should be occupied by any person in trade who should expose for sale and sell any goods, &c., in any shop or warehouse, being part of such dwelling-house, and in the front and on the ground or basement storey thereof. And also where such dwelling-house

should be occupied by a person who should be duly licensed to sell *therein* by retail beer, ale, wine, or other liquors. And a duty of 9*d.* in the pound of the annual value upon dwelling-houses not so occupied."

The premises the subject of the assessment now in question consist of a building facing Bath Street, Portobello, of two storeys in height, one above, and supported by the other, the lower one resting upon the earth. One roof covers the whole building, but each storey is so structurally composed and arranged for permanent occupation by a separate occupier that there is no internal communication of any kind between the two storeys, nor any common staircase or access to or from the street, or from any part of the outside of the premises, each having a separate entrance or entrances therefrom. In short, it would be impossible to erect two separate houses under one roof, or to divide one building into two distinct and separate houses more completely than has been accomplished in the building now under consideration. Indeed, before the appellant opened the lower house or storey as a public-house, it was let to a separate tenant, the appellant occupying only the upper house or storey as he does now. No person resides in the licensed premises. In law I think that each of these storeys constitutes a distinct and separate house, each of which if inhabited as a dwelling should be separately assessed to the duty imposed by the statute, but neither of which could be legally so assessed unless so used. They are not the less two houses because they are both owned and occupied by one and the same person.

I do not propose to cite more than one authority in support of this view, namely, that of Sir George Jessel M.R. in *Yorkshire Fire and Life Insurance Co.* v. *Clayton.* (1) "Formerly," said that learned judge, "houses were built so that each house occupied a particular site, but in modern times a practice has grown up of putting separate houses one above the other. They are built in separate flats or storeys, but for all legal and ordinary purposes they are separate houses. Each is separately let and separately occupied, and has no connection with those

(1) 8 Q. B. D. 421, 424.

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above or below, except in so far as it may derive support from those below instead of from the ground as in the case of ordinary houses. The Legislature" (referring to the Act 41 & 42 Vict.) "evidently intended to extend the same class of taxation to this new sort of houses as applied to houses built in the old style."

The building formed by these two storeys ought not, as I think, to be treated as one house let in different storeys within the meaning of Rule VI. of 48 Geo. 3, c. 55, Sched. B, so as to make the landlord liable to be assessed in respect of the whole building in the event of his living in the one storey and letting the other. Nor do I think that, owning and occupying as he does both storeys of the building, the lower floor can be treated as a shop attached to the upper floor as a dwelling-house, and valued with it in the assessment under Rule III.; and this for two reasons: first, because, although it might for some purposes in strictness be called a shop because goods in the shape of beer, spirits, &c., are sold therein by retail, it is not necessarily "a shop" within the meaning of the House Tax Acts. See the schedule to 14 & 15 Vict. c. 36, which recognises that a dwelling-house may be occupied by a person licensed to sell therein excisable liquors without the room in which the sales take place being "a shop." Moreover, even if the lower floor could be treated as a shop, it is not, in my opinion, attached to the dwelling-house in the sense contemplated by the Act, for, in my judgment, the Act did not intend the word "attached" to be satisfied by mere contact of some part of the two structures, but intended that it should be so attached for its use with the dwelling-house in the same way that, by Rule II., offices and buildings "belonging to and occupied with the dwelling-house are for the purposes of the assessment to be valued with it." It is further to be observed that no part of the trade of a public-house could be carried on in the dwelling storey, for the licence in this case is only to sell on the ground storey, and any sale elsewhere would be illegal; though in the case of the sale by retail of ordinary goods, they might be sold as well in the dwelling-house as in a shop.

The cases of *Attorney-General* v. *Mutual Tontine Association* (1), *Rusby* v. *Newson* (2), and *Yorkshire Fire and Life Insurance Co.* v. *Clayton* (3) have no application to this case if my view is correct, for they were all clear cases of separate houses, with many rooms in each let to various occupiers, the whole house being assessable upon the landlord, and the structural arrangements being very different from those of the present building.

The 41 & 42 Vict. c. 15 was passed for the purpose of removing the hardship which was put upon a landlord by the existing state of the law as declared by the *Tontine Case* (1), and to provide for the cases in which houses are let out in separate tenements, and tenements occupied solely for trade purposes. By s. 13, sub-s. 1, it was enacted that, "Where any house being one property shall be *divided into and let in different tenements*, and any of *such* tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupiers seek a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be entitled to relief so as to confine the amount of duty to that to which it should have been assessed, if it had been a house comprising only the tenements other than such as are occupied as aforesaid or are unoccupied." This section applies only to houses being one property—structurally divided into and let in different tenements. That could not apply to premises like the present, where the owner and occupier is the same person, and the building, though formed of two separate and distinct tenements, is not let out as such. The 2nd sub-section, however, applies to every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, and provides that such house or tenement shall be exempted from the duties, on proof of the facts to the satisfaction of the commissioners, even although a person may dwell in such house or tenement for the protection thereof. This sub-section exempts the occupier, whether he be the

(1) 1 Ex. D. 469. (2) (1875) L. R. 10 Ex. 322.
(3) 6 Q. B. D. 557; on appeal 8 Q. B. D. 421.

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owner or a mere tenant of any tenement solely occupied as mentioned. The present case clearly comes within it.

As the result of a careful consideration of this case, I am of opinion that the appellant is entitled to relief from duty in respect of his restaurant premises, being No. 49 in Bath Street, upon two separate grounds: First, that he never was liable to be assessed in respect of it, because if it constituted in itself a separate and distinct house it was never an "inhabited dwelling-house," and therefore was not assessable. Secondly, that if it ought to be treated as a tenement severed from a larger house, it is by 41 & 42 Vict. c. 15 expressly exempt from assessment to the house duty on the ground that it was and is solely devoted to trade and business, and *that* a trade or business which was licensed to be carried on only within the licensed area of the ground storey.

The appeal, therefore, ought to be allowed with costs.

Ordered, that the order appealed from be reversed; that the decision of the Commissioners be restored; and that the respondent do pay to the appellant the costs both here and below.

Lords' Journals, May 28, 1900.

Agents for appellant: *Godden, Son & Holme, for James Purves, S.S.C., Edinburgh.*

Agent for respondent: *Francis C. Gore, Inland Revenue, London, for Philip J. Hamilton Grierson, Inland Revenue, Edinburgh.*

[HOUSE OF LORDS.]

WEDDERBURN AND OTHERS . . . . APPELLANTS; H. L. (Sc.)
1900
May 28.
AND
DUKE OF ATHOLL AND OTHERS . . RESPONDENTS.
AND
DUKE OF ATHOLL AND OTHERS . . APPELLANTS;
AND
GLOVER INCORPORATION OF PERTH AND OTHERS . . . . . RESPONDENTS.

Salmon Fishery Acts—Illegal Methods—Fixed Engines—Toot and Haul Net—Prescription.

The toot and haul net used in the estuary of the Tay is fastened by a rope at one end to the shore. The net is then placed on a boat or coble; the boat with its net is pulled out by means of an overhaul rope to an anchor in the stream; the boatman on reaching the anchor attaches the net at about twenty yards from its end to a floating rope fastened to the anchor; the end of the net is then turned inward towards the shore forming a bend or hook, and the men on shore haul the net taut. Another rope attached to the boat keeps the net upright. The net is retained in this upright position until a fish strikes it, when the outer end is freed and hauled in by fishermen on shore so as to encircle the fish:—

Held, affirming the decision of the First Division of the Court of Session, that this mode of fishing for salmon was an illegal method within the meaning of the Salmon Fishery Acts.

SECOND APPEAL.

Salmon Fishing—Hang Nets—Illegal Methods.

The drift or hang nets used in the river Tay are from 80 to 220 yards long and 12 to 19 feet in depth, and are shot into the river about an hour before the turn of the tide both at high and low water, when the current is least. They are run out of a boat over the stern, in a straight line across the river, and followed with the current by a man in a boat, who, when he sees or feels the net struck by a fish, rows to the spot and captures the fish entangled in the net, or, if the fish is getting away, he secures it with a gaff. The net is not fixed to any post on the shore:—

Held, reversing the decision of the First Division of the Court of Session,

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that fishing in the tidal portions of the river Tay with drift or hang nets was an illegal method of fishing for salmon within the meaning of the Salmon Fishery Acts.

APPEALS from the First Division of the Court of Session, Scotland.

In the first appeal, the respondents, the Duke of Atholl and others, proprietors of salmon fishings on the river Tay or its tributaries situated above Mugdrum Island and above the fishings of the appellants, raised an action against Wedderburn and others, the appellants, proprietors or tacksmen of salmon fishings, for declarator that the appellants were not entitled by themselves, or by others acting with their authority and consent, to fish in any part of the river and estuary of the Tay for salmon, or fish of the salmon kind, with nets of the description known as toot and haul nets, or with stell nets, or with nets of a similar kind, and for interdict against the appellants placing or setting nets of these descriptions in any part of the said river or estuary. The toot and haul net was described in the third condescendence and answer as follows :—

"The 'toot and haul' net is a net from 5 to 10 yards in depth, and generally from 70 to 100 yards in length, the mesh thereof being from 8 to 10 inches all round. The net is fitted with a heavy rope at the bottom, while a cord runs along the top with cork floats, placed at distances of from 8 to 9 feet apart, which keep the net perpendicular while in the water. When the net is in working order, one end of it is fixed by a rope with a block for tightening, called the tow-line, to a post sunk in the shore. From this point the net runs outwards from the shore and against stream or current, forming an arc, and at a point from 50 to 70 yards out from the shore the top of the net is attached to a boat anchored outside the net. The 'anchor' is very often a fixed post driven into the bed of the stream. From this point the net is turned inwards towards the shore for about 18 or 20 yards, forming what is called the 'hook' or 'cleek,' and a rope fixed to the bottom of the net at the corner where the hook or cleek begins is attached to the anchor-rope in order to keep the net at that corner in position. At the turned-in end of the hook or cleek is the

'hook staff,' which is kept in an upright position by a rope called the 'hook line,' attached to the base of the hook staff and carried to the shore, where it is attached to a post with a block for tightening. The hook staff is also maintained in an upright position by ropes called 'bridles,' which lead from the top and bottom of the staff and are joined to one rope called the 'head,' or 'haul' rope, which is carried to the shore and there attached to a windlass. Besides these ropes to keep the net in position and to haul the net inshore, there is another rope called the 'off-haul,' which is attached to the anchor in the stream, and is used to haul the boat from the shore to its position in the river.

"The mode of working the net after being placed in the position above described is as follows: One man stands in the boat, and two men generally are on the shore in attendance at the windlass. When the man in the boat sees or feels a fish strike the net, he makes a signal to the men at the windlass, at the same time freeing the net from the boat and anchor rope in the stream, whereupon those on shore immediately haul the net in by means of the windlass. The man in the boat pulls ashore and assists in hauling in the net. After the fish are taken out, the net is laid on to the boat and the boat is again taken out by means of the off-haul rope to its former position, where the top and bottom of the net, at corner where the cleek or hook begins, are fixed to the boat and anchor-rope respectively as before, and the two men on shore tighten up the net by means of the rope attached to the windlass and the other two ropes attached with blocks to the posts. The net remains fixed for periods as long as six hours at a stretch, when a fish does not strike the net during that time. It will thus be seen that the net when fishing is a fixed engine, being firmly attached to three ropes made fast to the shore, and both under and above water, to the anchor-rope in the stream.

"The stell net, in its construction and use, resembles the toot and haul net, from which it differs only in detail, and is a fixed engine, the use of which obstructs the passage of salmon, and would be injurious to the fishings of the pursuers. The prohibition of toot and haul nets would be ineffectual to protect

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the rights of the pursuers unless the stell nets were also at the same time prohibited. The statements in answer are denied.

"Ans. 3. Admitted that the defenders, as proprietors or lessees of the fishings, are in the practice of using toot and haul nets. The description of the nature and mode of working of the said nets is admitted to be substantially correct, though its accuracy in detail is not admitted. It is denied that toot and haul nets, or stell nets, or either of them, are fixed engines. The mode of using the toot and haul net varies in some matters of detail at the fishing stations of the different defenders. The average time during which the net remains set, if no fish strikes it, is not above three hours. The toot and haul net is used only during daylight, and not at night. Explained that when the man in the boat sees or feels a fish strike the net he frees the net by simply letting go the small line from the net to the boat, known as the 'slip-line,' off its pin. As soon as the net is thus freed it is put in exactly the same position, and is worked in the same way as the ordinary sweep net, which is the mode of fishing employed by the pursuers themselves in their own waters. Quoad ultra denied. The modes of fishing carried on by the defenders are legal and proper, and neither unduly obstruct the passage of salmon, nor injure the pursuers' fishings. The said modes have been pursued in the waters in question by the defenders and their predecessors, as proprietors and tenant respectively of the said fishings, from time immemorial."

A witness described the ordinary net and coble or sweep nets as follows:—

"In the ordinary net and coble fishing the net is piled up on the boat, and the boat starts work from the upper end of the shot; it shoots out into the stream, and the net is paid out off the stern as the boat goes out into the river. A man on the shore keeps hold of the tow-line, and when the boat has got out to a distance which he thinks suitable he puts a check on the tow-line and the net begins to pay out. The tow-line may go out any distance from the shore. Then the boat, having gone out a certain distance down or up the stream, according to the tide, makes a sweep round into the shore again. When the boat comes in at the foot of the shot, it may be from 200

to 250 yards down or up from the place where it starts. When the boat lands the head-line—that is, the rope attached to the head of the net—it is put on the windlass, and the men begin to draw in the net. In the meantime the man with the tow-rope has been walking down the shore gradually to the windlass. It takes him about nine or ten minutes to go down. By that time the net is formed pretty well into a loop, and the men begin to pull in hand over hand until it is completely hauled on shore, and the fish, if there are any, taken out. The normal way of catching the fish in such a net is by inclosing them and drawing them up on the hauling ground in the net. The average length of the ordinary sweep net is 129 yards. It may be that they are in some cases as much as 170 yards long. The depth of the net is 8 yards. But it does not fish to quite that depth. It fishes to a depth of 18 or 20 feet. The size of the mesh varies from 8 to 12 inches in circumference. The aim of that method of fishing is to have the lower part of the net as nearly as possible close to the ground, in order to prevent the escape of fish. The lower side of the net is fitted with a heavy rope, and in some ropes there is a chain inside to give weight. The top of the net is fitted with cork floats. In the normal fishing the net will be as near as possible upright in the water, varying in form, and coming round with its bottom on the ground and the floats on the top. The idea is to prevent any fish getting either under or over. In some cases the rope at the bottom weighs 100 lbs. to 60 yards. It is a very heavy rope. In that method of fishing the net is slightly swelled out for a length of about 3 yards in the middle, forming a modified sort of bag. In the ordinary net and coble fishing, if the current is running strong, the man who has the tow-line sometimes fastens it round a pin. At the lower end of the shot there is a pin specially provided for the purpose, and when the strain is very heavy on the tow-line he fixes it to the pin or to a rope attached to the pin with a sort of wooden harpoon or nilliepin. When he has done this he is free to attend to the windlass. When that method is pursued, neither the rope nor that end of the net is in the hands of the fisherman at all—it is fastened. The head-line of the net is then wound in by

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means of the windlass. There is a wooden staff at the head of the net. It is exactly similar to the staff at the end of the hook of the toot and haul net. The object of it is to keep the head end of the net stretched, so that it shall not come back and close up. But for the staff the net would come to a point. The staff is weighted with a piece of metal at the lower end. Sometimes it is pretty heavily weighted. The weight has the effect of keeping one end of the staff down on the ground, thereby keeping the net approximately in an upright position. Up the river, where the ordinary nets and cobles are so thickly planted, I find that the sweep nets fish alternately from the two sides of the river. The practice is that when the staff of the one boat touches the ground the boat on the opposite side, which is ready waiting, immediately sets out to shoot. The nets on the opposite sides are placed comparatively near to each other. The same method of starting when the staff lands is adopted sometimes in the case of boats on the same shore; the boat above commencing to shoot immediately when the staff of the boat below is landed. The effect of that is that the river is practically closed by these nets, one being put in immediately the other is out. In practice it is not customary to limit the shot of the opposite proprietors to the medium filum, but to take all the water they can grasp alternately."

And the Bermoney boat is described as follows:—

"Where the fishing channel is too far from the shore to be worked with the ordinary sweep net, or where the character of the shore is not suitable for walking down; practically an artificial shore is obtained by the expedient of the Bermoney boat. The first and most natural alternative is for the man to walk along the shore on dry land with the tow-rope. The next would be, if there were some water, to wade along the shore with the rope. If, however, the water is of such a character that it is not safe for that to be done, the boat comes in place of the man, carrying the rope at the lower end of the shot at which the Bermoney boat is used. There is what is known as a cairn or artificial pier built into the river, and at the upper end, where the shot is started, there is a peg to which the other end of the rope is attached. When the

shot is going to be made, the Bermoney boat goes to the upper end, and along with it goes the ordinary coble, with the net piled up on its stern. When they are at the upper end of the shot, the ordinary coble rows out into the fishing channel and shoots the net just as if it had been doing it from the shore, and as if there was a man on the shore with the tow-line. In this case, however, the tow-man is in the Bermoney boat. There is a windlass at the side of the boat. When the coble has paid out the net in the usual way, it curves down the stream, and the Bermoney boat begins to haul down the shore-line. The man moves the boat down hand over hand. In that way the shore-rope is taken down. By the time the Bermoney boat gets there, the coble has already got in with the head-line of the net, and then the net is hauled on to the cairn just as it would be on to the ordinary hauling ground on the shore. The coble brings the head of the net into the hauling ground and the Bermoney boat brings down the tow-line, the two ends coming together and making the draught. Sometimes the net is worked without the cairn, when there is sufficient ground on the shore to give a hauling place; but I believe the cairn is the method usually adopted on the Tay."

The appellants contended that the toot and haul net was not a fixed engine; that this method of fishing was one of immemorial antiquity; that it had been in uninterrupted use on the tidal waters of the Tay and other rivers in Scotland for hundreds of years; that the Session papers in several of the cases dealing with other nets then in use on the Tay which the Court prohibited as illegal revealed that the toot and haul net was put forward by way of contrast, and admitted by all the parties in those cases to be a form of net and coble, and therefore a legal, mode of fishing; that the only question in *Hay* v. *Lord Provost, &c., of Perth* (1) was whether fishing by the Bermoney boat, a method then recently introduced, was truly a method of fishing by toot and coble; that the net there in use was not fixed in any way, and that the main argument for the appellant was based on the fact that no net had ever been declared illegal that had not been fixed or stented; that it was

(1) (1863) 4 Macq. 535.

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unnecessary for that case to inquire whether any fixed net had ever been admitted as legal; and that it was upon an inaccurate report of *Atholl* v. *Wedderburn* (1) that Lord Westbury's dicta were founded. They also alleged that the average time during which the toot and haul net was in the water if no fish struck it was not above three hours; that the toot and haul net was only used during daylight; that as soon as the net is freed from the boat it is put in exactly the same position and is worked in the same way as the ordinary sweep net, which was the mode of fishing employed by the respondents themselves in their own waters.

On March 3, 1899, the First Division of the Court of Session, affirming the decision dated May 18, 1898, of the Lord Ordinary (Lord Stormonth Darling), declared fishing with the nets of the description of toot and haul in the manner described above as an illegal method. (2)

1899. Dec. 11, 12, 14. *Asher*, *D.F.*, and *Dundas*, *Q.C.* (with them *Blackburn*, all of the Scottish Bar), for the appellants. The two modes of fishing struck at by the Scottish Acts (3) were cruives and yairs, and these were to be regulated or rendered illegal. The only difference between what is called net and coble fishing and that in question here is the mechanical mode of stopping the net until the fish comes into it. The question is, Was this against the law forbidding cruives and yairs, there being no specific provision of any statute which can be pointed to as prohibiting the mode of fishing adopted here? The toot and haul net could not be said to be a cruive; and while it was stationary it was not fishing, and therefore not a yair. The cases of *Duke of Queensberry* v. *Marquis of Annandale* (4); *Dirom* v. *Littles* (5); *Colquhoun*

(1) (1826) 5 S. 153; (2nd ed.) 139.
(2) (1899) 1 F. 651.
(3) Acts of Scots Parliament respecting fishing for salmon: Acts 1175, 1318, c. 11; 1424, c. 12; March 12th, 1424, c. 12; 1457, c. 34; 1469, c. 13; 1488, c. 16; 1489, c. 16; 1563, c. 3; 1567, c. 30; 1579, c. 27; 1581, c. 15; James VI. c. 32; James VI. 1600, c. 20; 1661, c. 320; 1685, c. 24; 1695; 1696; 1698; (Waters of Forth). See for these Acts Thomson's Scottish Acts, vols. 1, 2, 3, 4, 7, 8, 9, and 10.
(4) (1771) Mor. Dict. 14279.
(5) (1797) Mor. Dict. 14282.

v. *Duke of Montrose* (1); *Earl of Kinnoul* v. *Hunter* (2); *Duke of Atholl* v. *Maule* (3); *Duke of Atholl* v. *Wedderburn* (4); *Gray* v. *Sime* (5)—all merely prohibited something which was of the nature of a permanent obstruction in the river. Another group of cases deals with fishing by nets which are stented or fixtures in the river, and which automatically catch the fish; but these cases do not strike at all against the toot and haul net. The nets which have been held illegal are those fixed for days, the net here only catches fish when it moves, and there is no case where a difference of time in the sweep of the net has been considered a matter of importance. It is said that in the case of *Hay* v. *Lord Provost, &c., of Perth* (6) (commonly known as the Bermoney Boat Case), Lord Westbury laid down deliberately what net was legal and what was illegal. But that case had nothing to do with toot and haul nets, and therefore the remarks of Lord Westbury, relied on by the respondents, were obiter. (7) All the previous cases had been to prohibit some particular mode of fishing, and Lord Westbury's judgment was in favour of freedom. "Net and coble," he says, Is merely symbolical of a method of fishing. (8)

There may be various forms of fishing by net and coble, and the Bermoney boat are specimens of these, yet the respondents maintain that the net which was assumed throughout the whole series of restricted cases with reference to the Tay to be a legal method of fishing stands condemned by a definition contained in a judgment in favour of freedom. The Sessional papers of the cases cited before Lord Westbury shewed the reports to be meagre and misleading. How can Lord Westbury be said to have stamped the toot and haul net with illegality when he had no accurate judicial information of the toot and haul net? Nor did it, at the time the judgment was pronounced, ever occur to anybody that the judgment could

(1) (1793) Mor. Dict. 12827; (1801) 4 Pat. App. 221, 225; (1804) Mor. Dict. 14283.
(2) (1802) Mor. Dict. 14301; (1804) 4 Pat. App. 561; (1805) Ibid. 671.
(3) (March 7, 1812) 16 Fac. Coll. 537.
(4) 5 S. 153; (2nd ed.) 139.
(5) (1835) 13 S. 1089.
(6) 4 Macq. 535.
(7) 4 Macq. 544.
(8) 4 Macq. 546.

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affect the ancient and well-recognised legal method of fishing by toot and haul net.

As to prescription, the net here has been in use for hundreds of years on the tidal waters of the Tay, and it is impossible now to assert that it was not more ancient than the sweep net, or net and coble net, itself. A Crown title followed by forty years of cruives fishing has been held to give a good title to that particular kind of fishing: see *Johnstone* v. *Stotts*. (1)

A. Graham Murray, L.A., and *Scott Dickson, S.-G.* (with them *C. N. Johnston*) (all of the Scottish Bar), for the respondents. The method of fishing here in question is an obstruction of the river, and is a violation of the common law principle, in the same way that cruives were held to be a violation of common law—that is, the toot and haul net is a fixed engine, for the fishing begins the moment the net is set. The net is kept stretched or stented between fixed points on the river for sometimes several hours, whereas in the net and coble fishing from the time the shot begins until the net is drawn upon the beach the net is constantly in motion. The appellants maintain that the cases they cite do not strike against the toot and haul net; but the respondents contend that they do. Lord Westbury's judgment in the *Bermoney Boat Case* (2) did not go beyond previous decisions; and it was to the effect that anything which was fixed or permanent, or that obstructed the fish even for a time, was illegal. (3) There is a common law right not to have salmon obstructed. The statutes mention certain modes of fishing as illegal, but extend also to all obstructions of the fish.

As to prescription, an ancient mode of fishing, if illegal, cannot be upheld: *Erskine* v. *Magistrates of Stirling* (4); *Duke of Queensberry* v. *Marquis of Annandale* (5); *Dirom* v. *Littles* (6); *Colquhoun* v. *Duke of Montrose* (7); *Cunningham* v. *Taylor* (8); *Earl of Fife* v. *Gordon* (9); *Gray* v. *Sime* (10); *Mackenzie* v.

(1) (1802) 4 Pat. App. 274.
(2) *Hay* v. *Lord Provost, &c., of Perth*, 4 Macq. 535.
(3) 4 Macq. 535, 544.
(4) (1763) Mor. Dict. 14268; (1765) 6 Pat. App. 774.
(5) Mor. Dict. 14279.
(6) Mor. Dict. 14282.
(7) Mor. Dict. 14281, 14283; 4 Pat. App. 221.
(8) (1804) Hume, 715.
(9) (1807) Mor. Dict. App., Salmon Fishing, No. 2.
(10) 13 S. 1089.

Renton (1); *Ramsay* v. *Duke of Roxburghe*. (2) In fact, you cannot prescribe for something which is illegal.

Asher, D.F., in reply.

SECOND APPEAL.

In the second appeal, the appellants, the Duke of Atholl and others, proprietors of salmon fishings on the river Tay and its tributaries, raised this action against the respondents, the Glover Incorporation of Perth, and other proprietors or lessees of salmon fishings on the river or estuary of the Tay, for declarator that the respondents were not entitled by themselves, or by others acting with their authority and consent, to fish in any part of the river Tay for salmon or fish of the salmon kind with nets of the description known as "hang nets" or "drift nets," and for interdict accordingly. In the Court of Session a question was raised as to whether the decision of *Earl of Wemyss* v. *Earl of Zetland* (3) concerning the legality of the use of the same net and dealing with fishing rights in the same river (the Tay) was res judicata. But the question of res judicata was not raised in this House.

The evidence in respect to the nets complained of was substantially as follows: These nets were from 80 to 220 yards in length. The depth of a net is about 17 to 19 feet. The size of the mesh is from 11 to 13 inches round; on an average, 12 inches. They are generally sunk by means of a rope at the foot of the net. The net is generally made of very light material. Corks or floats are attached to the top of the net to support it. The nets are usually put out about slack water. If it is at low water when they begin to shoot, they shoot as soon as they know the tide has reached them; and if it is at the other end, they commence when the tide begins to stand, neither running up nor down. There are two turns in the twelve hours. Formerly there used to be two men in the boat when the net was being shot, but now there is usually only one. The net is piled up on the small platform at the stern of the boat, and when they begin they put out a little bit of the net,

(1) (1840) 2 D. 1078. (2) (1848) 10 D. 661.
(3) (1890) 18 R. 126.

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and it catches hold of the water with sufficient force to hold it, and then the man rows away, and the water holding the net coils off the rest. The distance of the nearest end of the net to the shore depends on whether the main channel of the river is far over or near, but in most places it would be several hundred yards. The object is to extend the net across the main channel. They place it so that the centre of the net will be about the centre of the main channel. The net is not fixed to any pole or post on the shore. There is no pole or post at the end further from the shore either; the net is completely separate and free from the boat in daylight. After the net is shot, the boatman goes back near the centre of the net and remains there. At night the boat is attached to the net, to enable the boatman to pick it up if necessary. In the daytime, after the net is completely shot, it stands across the main channel without support at either end. The rope at the bottom of the net is sufficiently heavy to keep it practically perpendicular. When the net is in the water, there is usually very little current—just slack water. The length of time the net is allowed to remain depends on the strength of the tide. Sometimes it is in as short a time as twenty minutes, and on other occasions as long as thirty-eight minutes. From twenty to forty minutes is a usual time for a net to be in the water. During the time it is in the water it moves slightly up and down. It does not stand straight across; the tide or the force of the fresh water, according to whichever is stronger, moves it slowly up and down. Sometimes it goes one way and sometimes the other. During the half-hour in which the net is in the water it may drift 50 or 60 yards up the river and the same distance back again. The run of the fish is chiefly in the main channel of the river. During the twenty or forty minutes the net is in the water the fish cannot get past. The boat which is used is just an ordinary coble. It has no special appliance at the stern. There is a small deck sort of place at the stern for the net to rest upon, the same as in any other coble. There is generally one man in each boat. The floats of the net are fixed on the head-rope. When the net is in the water, the top is just about flush with the surface of the water.

At the point where the water is shallow, the shore-end of the net is generally a good way out, perhaps 300 to 400 yards. The point where the man begins to pay out the net depends on the state of the river at the place, and how far the main channel is from the side. The net is not dragged or held by the man at all while it is in use. When it is put into the water, it is as straight across the run of the water as they can possibly put it. When the net is down and the boat detached from it, the boatman goes to about the middle of the net and about 20 yards or so from it. He watches the net, and when he sees a fish strike, which he can tell by the cork dipping or the fish making a splash, he pulls up that part of the net and takes out the fish, as a rule, with a gaff. He then drops the net and goes back to his station. The net is lifted when it begins to go out of order —when it begins to turn up or down the stream, or gets out of fishing order.

On March 3, 1899 (1) the First Division of the Court of Session, adhering to the decision of the Lord Ordinary, dated May 18, 1898, held, following the decisions of *Earl of Wemyss* v. *Earl of Zetland* (2) and *Masters of Allan's Mortification* v. *Thomson* (3), that the hang net or drift net used in the tidal portion of the river Tay was not an illegal method of fishing for salmon.

Feb. 8, 9, 12. *A. Graham Murray, L.A.*, and *Scott Dickson, S.G.* (with them *C. N. Johnston*) (all of the Scottish Bar), for the appellants. This description of fishing is quite illegal as being an obstruction; the Courts below would have decided to that effect, but they were of opinion that they were bound by the cases mentioned above; the net is not used to effect a sweep, but purely as an obstruction. *Hay* v. *Lord Provost, &c., of Perth* (4) shews that the net must be active and managed by the fishermen. Here the man does nothing until the fish is entangled in the net. The natural habit of the salmon is to reach the sea and also to go up the river to propagate, and their journey to and fro must not be obstructed.

(1) 1 F. 658.
(2) 18 R. 126.
(3) (1879) 7 R. 221.
(4) 4 Macq. 535, 544.

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[They commented on *Dirom* v. *Littles* (1), *Gray* v. *Sime* (2), *Masters of Allan's Mortification* v. *Thomson* (3), and Bell's Principles, 1116.]

Asher, D.F., and *Dundas, Q.C.* (with them *Blackburn*) (all of the Scottish Bar), for the respondents. The mode of fishing salmon consists of a boat proceeding from the shore with a net to the middle of the river, where the boatman pays out the net; during the daytime he does not retain a hold of the net, but during the night he does, not for the purpose of retaining the net, but to guide it. This process can only be done for a short time before and after the turning of the tide; some of the nets are out twenty minutes, but the longest time is thirty minutes. This is a bonâ fide mode of fishing.

In *Masters of Allan's Mortification* v. *Thomson* (3) the net was kept attached to the boat: that was an attempt to make the net a fixture; but here the net is not attached to the boat, and, therefore, is less of the nature of a fixture. It is simply a net floating with the water; the reason why the statutes are directed against fixed engines is because they are obstructions apart from fishing; but this is a bonâ fide mode of fishing—therefore legal. Fishing with net and coble may take all the fish or obstruct all the fish, but that mode has never been challenged; if this is an exercise of a legitimate mode of fishing, then the respondents are entitled to continue it.

[They referred to *Duke of Sutherland* v. *Ross* (4), *West* v. *Aberdeen Harbour Commissioners* (5), *Duke of Atholl* v. *Wedderburn* (6), *Colquhoun* v. *Duke of Montrose* (7), *Masters of Allan's Mortification* v. *Thomson* (3), and *Earl of Wemyss* v. *Earl of Zetland.* (8)]

A. Graham Murray, L.A., in reply.

The House took time for consideration.

May 28. EARL OF HALSBURY L.C. My Lords, in both these cases the question is whether the mode of catching salmon in the

(1) Mor. Dict. 14282.
(2) 13 S. 1089.
(3) 7 R. 221.
(4) (1877) 4 R. 765; (1878) 3 App. Cas. 736.
(5) (1876) 4 R. 207.
(6) 5 S. 153; (2nd ed.) 139.
(7) Mor. Dict. 12827.
(8) 18 R. 126.

Tay pursued by those who are described in the two cases as fishing is a mode which may be lawfully pursued, and I am of opinion that both modes are unlawful.

My Lords, the case known as the *Bermoney Boat Case* (1) brought to a definite issue of principle what is or is not lawful in the use of a net, and I think the distinction may be compendiously stated as the result of the cases concluded by the case to which I have referred is that a fixed net is unlawful, while a net used by a fisherman in the act of fishing is lawful. I cannot help thinking that some ingenious person has carefully considered the exact words used by Lord Westbury in the case in question, and has sought to evade the pressure of his words by colourable alteration of the method in which the net is treated, but "qui hæret in literâ, hæret in cortice." The nets in both these cases seem to me to be fixed engines. The mode in which they operate is not an act of fishing at all. It is a wall of net suspended across the stream—not to operate to catch a fish in the ordinary mode by which a net is used to catch fish, but fixed and operating as an obstruction through which the fish attempts to get, and entangles himself by his efforts to get through the net, and so is caught. This doubtless is the way in which fish are caught when herring nets are in some places put into the sea, but such an operation is not, to my mind, an act of fishing at all, and the evidence as to the effect of a succession of nets used in this way all up the stream shews what an enormous obstruction to the ascent of the fish is thus created; and, undoubtedly, this is one of the reasons which led the Scottish Parliament to enact that fixed engines were unlawful.

Of course, a net however used is in itself an obstruction; but there is all the difference in the world between the temporary use of a net in the act of catching a fish and what I have described as a wall of net remaining and intended to remain for a considerable time motionless and, in that sense, fixed. And it appears to me that by a long line of decisions the broad distinction has been insisted upon, and, to my mind, unanswerably concluded, by the judgments in *Hay* v. *Lord Provost of*

(1) *Hay* v. *Lord Provost, &c., of Perth*, 4 Macq. 535.

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Perth. (1) Lord Westbury described the mode of fishing which he held to be lawful, and which he said came within the principle of ordinary net and coble fishing because it was a mode of fishing which exists only and takes the fish only while the net is kept in motion, and which preserves all the distinctive peculiarities of fishing by net and coble, namely, taking a grasp of a portion of the river during such time only as is required for the boat to row round the net. And Lord Chelmsford in the same case described the decisions which had been quoted to him as establishing that contrivances for the purpose either of preventing the fish from passing up the river or catching them by fixed nets were illegal.

The principle, I think, is established also by the judgment of the Lord President in the earlier stages of the same case. One passage seems to me to put the matter very clearly. The Lord President said: "The judgment of the House of Lords is quite clear as to stent nets. Then, in the case of *Duke of Queensberry* v. *Marquess of Annandale* (2), it was fixed nets for obstructing the passage of the fish, used" (as the judgment states), "not for the purpose of catching fish, but for preventing or obstructing them from passing up the river, and, therefore," it is found "that the methods used of stenting nets across the river, either reaching altogether from side to side, or overlapping each other in the manner mentioned in the proof, &c., are illegal. Fixed nets, which would prevent altogether the passing of the fish, I hold to be unlawful, whether the engine be a fixed net or fixed stakes stationary in the water. In the case of *Dirom* v. *Littles* (3) it was a hang net; in the *Seaside Case* (4) it was a stake net; in *Duke of Atholl* v. *Wedderburn* (5) it was toot nets and stake nets and stent nets alleged to be of the nature of stake nets. Then in the case of *Cunningham* v. *Taylor* (6) it was a dyke erected; in the case of *Mackenzie* v. *Houston* (7) it was the case of stent nets, the one end of the stent net being fixed by an anchor in the stream,

(1) 4 Macq. 535.
(2) Mor. Dict. 14279.
(3) Mor. Dict. 14282.
(4) *Earl of Kinnoul* v. *Hunter*, Mor. Dict. 14301; 4 Pat. App. 561.
(5) 5 S. 153, (N.S.) 139.
(6) (1804) Hume, 715.
(7) (1830) 8 S. 796.

and the other end on shore, and the net so fixed was left standing stretched into the river—a fixed engine for catching the fish."

Now it seems to me that both the hang nets and the toot and haul nets are illegal within the principles laid down by all the cases. In neither case is it an act of fishing—it is a fixed net, and although fixed but for a time its operation is that of an obstruction. It remains, as nearly as the person managing it can procure it to do, perfectly still, and its operation when thus still is simply obstruction. When a fish strikes it it is true the fisherman then does something to catch the fish, most commonly by gaff, but its operation is what I have said.

Under these circumstances it appears to me that the use of these nets in both the cases and upon the admitted facts is illegal, and I accordingly move your Lordships that the judgment in the first case should be affirmed, and in the second case be reversed, with the usual result as to costs in each case.

LORD MACNAGHTEN. My Lords, I agree with my noble and learned friend in both cases.

In the course of the argument, which was marked by great learning and great research, the attention of your Lordships was called to several ancient statutes and to many interesting cases decided before *Hay* v. *Lord Provost, &c., of Perth* (1) was brought up to this House in 1863. But I do not think it at all necessary to discuss those cases, or to inquire whether the law as to net fishing in Scotland has been deduced by a process of liberal interpretation permissible in Scotland and not altogether unknown in England from enactments, in some cases at any rate, rather limited in their scope, or whether those ancient statutes are to be regarded merely as examples and instances of particular cases in which the Legislature thought fit to interpose by special prohibition for the purpose of checking practices growing up here and there in contravention of the common law. However that may be, it seems to me that the law on the subject is now finally settled by the decision of this House in *Hay* v. *Lord Provost, &c., of Perth* (1), and that

(1) 4 Macq. 535.

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nothing would be gained by trying to go behind that decision. And, looking for a guide in the opinions delivered in that case, I must say, speaking for myself, that I rather prefer the simple test proposed by Lord President McNeill and adopted by Lord Chelmsford to the more elaborate disquisition of Lord Westbury, which led that noble and learned Lord incidentally to the conclusion that fishing with a casting net was very much the same thing as fishing with a draft net, and which, in the case of *Masters of Allan's Mortification* v. *Thomson* (1), contributed in some degree to a decision not, I think, in accordance with established principle.

Net and coble, in practice, seems to be nothing more than the ordinary method of working a draft net or seine, where, owing to the breadth of the water or some other cause, it is impossible to make use of both banks of the stream for drawing the net; one end is taken down by a man walking or wading along the shore, the other end by a man in a boat. In the case of Mrs. Hay's fishings it was inconvenient or impossible for a man to make his way along the shore, and so the shore end of the net was brought down by a boat. There was nothing special about the boat except its name, taken apparently from the place where it was used. The boat is spoken of as the *Bermoney Boat*, and the case of *Hay* v. *Lord Provost, &c., of Perth* (2) is commonly referred to as the "Bermoney Boat Case," as if there was something peculiar about the construction of the boat or its use. In reality there was nothing of the sort. The boat was an ordinary boat, moved to and fro by means of a rope attached to a pin in the bed of the stream. Some stress was laid on the existence of this pin—a fixture it was called, and an obstruction. But an anchor would have served the purpose just as well, and the particular way of moving the boat had nothing whatever to do with the use of the net as a means for catching fish. It was contended, however, that the substitution of this boat for a man walking or wading along the shore was such a departure from the ordinary and accustomed mode of net and coble fishing as to make the fishing illegal. It is very difficult to see any substance

(1) 7 R. 221. (2) 4 Macq. 535.

in the objection. But the majority of the learned judges in the Court of Session gave effect to it. Lord President McNeill alone dissented from his colleagues, and this House agreed with the dissentient judge. "The judgment of the Lord President," observed Lord Westbury L.C., "expresses correctly the rational interpretation of the law." "I think," said the Lord President, "the question may be put in this form. Is this net and coble, or is it not? That is the real question apart from the other question as to putting obstructions into the alveus of the river. Is this a fair exercise of the right of fishing by net and coble, or is it not?" "I think," added his Lordship in a subsequent passage of his opinion, "that improvements upon the net and coble mode of fishing, so long as it is fair net and coble, are just as lawful as improvements upon anything else." The view of the Lord President was adopted in substance by Lord Westbury, and in terms by Lord Chelmsford. "The only point to be determined," said Lord Chelmsford, "is whether the mode of fishing employed by the appellant falls under the description of net and coble fishing or is such an addition to, and variation from, the sort of fishing understood by that denomination as to render it a distinct and different kind." Both the noble and learned Lords who heard the case were agreed that net and coble fishing in the ordinary way did not admit of the use of a fixed net.

Of course, people may fish illegally with net and coble just as people may fish illegally with rod and line. The instruments used may be perfectly legal in themselves, but they may be used in an unlawful manner. The point, I think, was very well put by the Lord President in some observations which are not without a bearing on both the cases now under consideration. "I do not say," said his Lordship, "that a party may not use a net and use a coble in a way that is a mere evasion of the right of net and coble fishing. For example, a party puts a fixed net across the river and he has a coble behind it in which he goes to take out the fish when they are caught—he is using both net and coble, but that is not what is meant by fishing by net and coble. That is a perversion and evasion of net and coble."

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Lord Macnaghten.

So the question seems to be, Are these two nets—the toot and haul net in the one case, and the drift or hang net in the other—fair net and coble or not?

The toot and haul net is what is called in some parts of the country a fixed draft net. Instead of being drawn as soon as it is shot, the net is set across the stream, the staff at the far end being fastened to a rope attached to a windlass on shore. The net is held in position by a boat at anchor about twenty yards or so from the end of the net, which is turned back towards the shore so as to form a bend or hook. The man in the boat remains on the look-out and in touch with the net. When he becomes aware of the presence of fish within the bounds and grasp of the net, he signals to the men on shore and sets the net free for them to haul it in at once. As far as regards the paying out and the hauling in the net is fair net and coble. There is no question about that. But in the interval, and as long as it is set, the net is a fixed engine held in position for the very purpose of obstructing the run of the fish and barring their progress. So the toot and haul net really performs two different and distinct functions. If those two functions were performed by two different nets, no one could doubt that the operation was illegal. Nets stretched or stented across the channel of a river, or any part of the channel, for the purpose of obstructing the passage of salmon, have invariably been held illegal. The illegality is none the less because the same net is used for a legal as well as for an illegal purpose. This mode of fishing, to use Lord Chelmsford's words, is, as it seems to me, "such an addition to and variation from the sort of fishing understood by the denomination of net and coble as to render it a distinct and different kind." It is, in fact, an illegal addition to a legal method of fishing.

It was urged that the toot and haul net was sanctioned by immemorial usage. The evidence is not altogether satisfactory on the point. Assuming, however, the fact alleged to be established, it is clear law that "no length of possession can sanction an illegal mode of fishing, or give an available right to continue it when complained of": *Mackenzie* v. *Renton*. (1)

(1) 2 D. 1078.

The drift net or hang net, the legality of which is challenged in the next case, is not used after the manner of a draft net. Nor is it adapted for any such purpose. It is not strong enough or deep enough for that. The mode in which it is used is this: It is shot across the river when the water is slack at the turning of the tide. It is then cast adrift and left to move with the moving water, without dragging along the bottom, until the current, swirling and eddying as it grows stronger and stronger, throws the net out of fishing order. Fish are not caught in a drift net by being inclosed and drawn to land. The net is of very fine texture, and made of very light material so that it may not scare and turn the fish. It is scarcely perceptible in the water, and the fish swimming about with the tide strike against it and become either gilled or hung in the meshes, or rolled and entangled in the loose and yielding folds with which they come into contact. The net as it drifts is attended by a man in a boat. When the attendant judges from the motion of the corks that there is a fish in the net, he goes and either lifts up a bit of the net and tosses the fish into the boat or secures his catch by a gaff. Apart from the use of the gaff, which is apparently illegal when used as auxiliary to net fishing, it seems to me to be clear that this mode of fishing is not fair net and coble, but an evasion and perversion of net and coble and something substantially different from it. Indeed, I think it would be impossible to find two sorts of net more different, the one from the other, than the ordinary draft net and the ordinary drift net.

I therefore concur in both the motions which have been proposed. Both nets are, I think, illegal.

My noble and learned friend Lord Morris, who is unable to be present this morning, has requested me to express his concurrence.

LORD DAVEY. My Lords, I had not the advantage of hearing the arguments in the case of Wedderburn against the Duke of Atholl, which is now before your Lordships for judgment, and I, therefore, express no opinion upon the decision of that case.

With regard to the other case, that of the Duke of Atholl

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Lord Davey.

against the Glover Incorporation of Perth, I agree with my noble and learned friends who have preceded me in thinking that some confusion has been introduced into this branch of law by a misunderstanding of a passage in Lord Westbury's judgment in the case in this House of *Hay* v. *Lord Provost, &c., of Perth.* (1) The noble Lord is there reported as saying (I quote from Patterson): "If I were asked to define the conclusion which I should derive from the statutes and the decisions, it would be this—that it was not legal to fish with a net unless the net continued in the hand of the fisherman. The net must not quit the hand, and the net must be in motion in the operation of fishing." Now, I do not think that those words should be interpreted in a narrow or literal sense. The mere fact that the fisherman is holding one end of the net whilst the net is left to catch or impede the passage of the fish of itself is not what was meant. And, on the other hand, the fisherman might conceivably attach the end of the net to his boat, and move the net by rowing the boat, and yet be within the rule. What I understand to be meant is that the net must be under the effectual command and control of the fisherman, and be kept in motion by him for the purpose of inclosing the fish within its sweep—or, in other words, the fisherman must be fishing with the net, and not merely regulating its position in the stream so as to catch the fish of itself.

I think the effect of the decision in *Hay's Case* (1) (as very clearly expressed in Lord Chelmsford's judgment) is that net and coble fishing is the type, and the exclusive type, of all lawful fishing for salmon with nets; and although other modes of fishing may conceivably be invented differing in some details and in form from net and coble fishing as at present practised, they must conform to that mode of fishing in substance. Tried by this standard, I think that the mode of fishing practised by the respondents as disclosed by the evidence is unlawful, and the appeal should consequently be allowed.

LORD BRAMPTON. My Lords, the Duke of Atholl and others, proprietors of salmon fishings in the river Tay, sought in this

(1) 4 Macq. 535, 544, 555.

action to obtain a decree against the defenders, who are proprietors or lessees of fishing on the estuary of that river below the fishings of the pursuers, to restrain them from fishing for salmon with nets known as "toot and haul" nets, or other nets of a similar kind.

The Lord Ordinary pronounced such decree in favour of the pursuers. On appeal to the First Division of the Court of Session the judgment of the Lord Ordinary was unanimously affirmed, upon the ground that the Court was bound by the principle and rule of law enunciated by Lord Westbury L.C., and concurred in by Lord Chelmsford in this House in the case of *Hay* v. *Lord Provost, &c., of Perth.* (1) In this view I entirely agree; and, applying that principle to the present case, I find it impossible to escape from the conclusion that the use of the toot and haul net in the manner described both by the pursuers and the defenders was and is illegal.

The essence of Lord Westbury's judgment consists in these words (1): "It is illegal to fish for salmon with any net, or with any species of engine or machinery devised or constructed for catching fish, which is a fixture, which is at all fixed, or permanent even for a time in the water"; and he went on to say: "and if I were asked to define the conclusion which I should derive from the statutes and the decisions, it would be this, that it was not legal to fish with a net unless when the net continued in the hand of the fisherman. The net must not quit the hand, and the net must be in motion during the operation of fishing."

I cannot think that by those latter words it was intended to convey that any slight departure from a literal compliance with these requirements would render the fishing illegal, but that the net must practically be kept incessantly in motion, as it would of necessity be in an ordinary case of fishing by net and coble where the hand of the fisherman only is employed.

The appellants deny the finality of that judgment so far as regards the principle upon which this case is to be determined, alleging, first, that the rule of law, as enunciated by Lord

(1) 4 Macq. 535, 544, 555.

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Westbury, was not necessary for the decision of the case then before him; secondly, that it was inapplicable to the facts and the question now before this House; and, thirdly, that his Lordship misapprehended a former case of *Duke of Atholl* v. *Wedderburn* (1), cited before him, in assuming that toot nets had been in that case condemned as illegal. This last point I do not think this House can entertain. The first two, however, are matters it is bound to satisfy itself upon. I have, therefore, given them my earnest consideration, with this result—that I am strongly confirmed in the opinion I entertained at the close of the argument that toot and haul nets as used in this case were and are illegal, from whatever point of view they are looked at. To appreciate this it is necessary to have a clear and distinct understanding of the character of the net, with all its appliances, and the mode of working it—all which will be found stated with sufficient accuracy in the third condescendence and the answer thereto in pp. 7, 8, and 9 of the appellants' case. (2)

It is somewhat difficult to assign to the toot net its true office. In answer 4, p. 10, of the appellants' case it is "admitted that the toot and haul nets *are adapted for and have been used* by the defenders *for the purpose* of catching salmon and fish of the salmon kind"; but at p. 24 I find this passage: "The most important point about the action of this net is, the appellants maintain, that it does not capture fish while in its stationary position. If left in the water unattended, it would neither catch nor obstruct fish. There is nothing to prevent fish swimming round the net, just as they may and frequently do swim round or back from the sweep net; and they are caught by being surrounded by the net after it has been cast loose and hauled on shore by the fisherman."

Now, it seems to me that per se the toot net, the use of which is objected to, is *not*, while extended and stationary, adapted for capturing salmon, for it has no bag or trap attached to it, into which a salmon might enter in trying to clear the net, but from which, once in, it could not extricate itself.

(1) 5 S. 153, (N.S.) 139.

(2) See ante, pp. 404, 405, 406.

During such time it could only operate as an obstruction to check the fish in its onward progress up the stream until such time as the net should be freed from the boat and hauled on shore. It is very obvious that such was the purpose for which it was designed. The hook or cleet very much assists the attainment of this object, for if a fish obstructed by the extended net at right angles with the shore attempted to make its way round the end of the net, instead of finding that way clear, he would find his progress impeded by the hook or cleek and held within the ambit of the net until the haul was made. This, to my mind, is very strong evidence that the sole object of the stationary extended net is to obstruct; and the keeping the extended net stationary across the flow of the river for three or more hours waiting for fish to come is confirmation irresistible that obstruction was the object—that is, to keep the fish *below* the line occupied by the net, and to capture him by releasing the net from the boat, and so converting it into a sweep or drift net from below that line until the fish is landed on the shore.

Until the net is freed from the boat, except in shape and mesh it has none of the character of a sweep net, but from that time the freed net hauled by the boat performed an operation similar to that which would be legally performed by a simple net and coble mode of fishing.

In order to determine whether the fishing by toot and haul is legal or illegal, the whole process from the moment the net is placed in position until it is finally hauled on shore must be treated as one operation, for every part of that process is directed towards the one object, namely, the capture of the fish, to check its progress by the net until the net is closed around it, and then to secure its capture by that same net put to a totally different use as a haul net. During the first part of the operation the net is admittedly stationary until the fish is actually obstructed, and is within the range of the net which is to complete its capture.

The appellants in their case, page 25, make this statement: "At common law there is nothing to prevent a proprietor of salmon fishing catching fish by any manner of nets he pleases

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so long as he bonâ fide attempts to capture the fish, *and does not merely block their passage up the river in order that he may catch them otherwise below the obstruction.* Such an obstruction could, it is believed, be suppressed at common law, or perhaps by an equitable extension of the Act relating to fishing at mill-dams across rivers, or the statutes dealing with cruives which are illegal unless when used by proprietors having right to cruive fishings in fresh water, in which case they are legal obstructions, subject to statutory regulations."

I cannot entertain a doubt of the soundness of the judgments of the Courts below. I think, therefore, that this appeal should be dismissed with costs.

With regard to the appeal in the case of the Duke of Atholl and others against the Glover Incorporation of Perth and others. This is an appeal from a judgment of the First Division of the Court of Session in Scotland, declining to declare the illegality of fishing for salmon with what are known as *hang nets*, in the river or estuary of the Tay, following the decisions of the First and Second Divisions in the cases of the *Masters of Allan's Mortification* v. *Thomson* (1), *Earl of Wemyss* v. *Earl of Zetland* (2), which the Court felt were binding upon it.

I can see no substantial distinction between this case and that of *Wedderburn* v. *Duke of Atholl*, just decided by this House. The hang net and the method of using it may, I think, be thus described with practical accuracy. The net itself is an oblong net made of very light material, from 80 to 150 yards long, and from 5 to 6 yards deep, fitted on the upper side throughout its length with a light cord and floats to keep it up to the level of the surface of the water, and on the lower side with a thick rope sufficiently heavy to sink it, when used for the purpose of fishing, as low down in the water as the net is deep. It is paid out for its full length from an ordinary coble boat at a right angle across the current, and when so paid out forms to that extent a perpendicular barrier of network across the current. There is nothing required beyond the weight of the rope to fasten the net either to the bottom or the side of the river. It hangs freely in the water

(1) 7 R. 221. (2) 18 R. 126.

floated and weighted as I have described. No doubt the action of the current upon the net is calculated more or less to shift the position of it, and so from time to time to make it necessary to gather it up and reshoot it, to restore it to its perpendicular position, to maintain which is the object of the fisherman; for so long as it can be maintained in that position it is a continuous slowly floating barrier at a right angle with the current, offering quite as effective and serious an impediment to fish proceeding upwards as if it were stationary, keeping many of them below the line of the net in the stream, so that they may be captured from the boat (which remains in attendance on the net) in their endeavours to get beyond it, or be secured by the gaff, which is mostly used, and the use of which for such purposes is illegal.

I do not say that there is any absolute obstruction which would render it impossible for a fish to proceed upwards or downwards beyond the net, for there is mostly a space between the bottom of the net and the bed of the river if the fish should chance to be swimming low down, or perchance they managed to find their way to one end of the net so as to get round it, and so defeat the intentions of the fisherman.

If I had before me simply the evidence of Maxwell, one of the defenders' witnesses, I could come to no other conclusion than that the object of the hang net was not to capture fish in the ordinary mode as by net and coble, but to impede the progress of the fish whether going up or down the river, to keep them on that side of the net they might chance to be approaching until they became unable to escape from the gaff, whether they previously had become entangled in the net or not.

I can discover no satisfactory distinction between the use of the hang net and the operations complained of in the cases of *Duke of Queensberry* v. *Marquess of Annandale* (1) and *Dirom* v. *Littles* (2), referred to in the appellants' case in *Wedderburn* v. *Duke of Atholl*, pp. 26, 27, and Appendix, pp. 86, 87; and I think it falls within the principle and rule of law laid down by Lord Westbury in the case of *Hay* v.

(1) Mor. Dict. 14279. (2) Mor. Dict. 14282.

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Lord Provost, &c., of Perth (1), with the concurrence of Lord Chelmsford, "that it is illegal to fish for salmon with any net which is a fixture, which is at all fixed or permanent even for a time in the water," a decision which met with the approval of Lord Blackburn in *Duke of Sutherland* v. *Ross* (2); for although it may be said that the net in this case is not stationary in one spot for any length of time, still, used as it is chiefly in slack water, it is in a perpendicular position when first paid out, and is retained in that position for as long a time as is possible; and so long as it so floats gradually down the current it remains a continuous obstruction. I think this brings it within the spirit of the decision, having regard to the mode in which the capture of fish is effected.

I think, then, that the use of the hang net as described is illegal, and that the judgment appealed against should be reversed with costs.

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Ordered that the interlocutor in part complained of be affirmed, and that the appellants do pay to the respondents the costs both here and below.

THE DUKE OF ATHOLL AND OTHERS *v.* THE GLOVER INCORPORATION OF PERTH AND OTHERS.

Ordered that the interlocutors so far as appealed from be reversed, and that the respondents do pay to the appellants the costs of the action in the Court of Session, and also the costs incurred in respect of this appeal.

Lords' Journals, May 28, 1900.

Agents for appellants in first appeal and respondents in the second appeal: *Grahames, Currey & Spens, for Dundas & Wilson, C.S., Edinburgh.*

Agent for respondents in first appeal and appellants in the second appeal: *Stibbard, Gibson & Co., for Thomson, Dickson & Shaw, Edinburgh.*

(1) 4 Macq. 535. (2) 3 App. Cas. 746.

[PRIVY COUNCIL.]

EDGAR . . . . . DEFENDANT;

AND

PLOMLEY AND ANOTHER . . . . . PLAINTIFFS.

J. C.*
1899
Nov. 24.
1900
May 15.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Administration Suit—Fund carried to Separate Account—Assignment of Separate Fund—Notice—Equity against Assignee.

Where a fund in court in an administration suit is carried to a separate account, the persons specified in its heading are the owners of the fund so far as is consistent with its retention in court released from the general questions in the cause and free from claims by other sharers in the estate.

Where a fund standing to a separate account is specifically assigned for value by a person entitled thereto according to the terms of the account:—

Held, that the assignor's general liability to other parties to the suit to make good defaults in his character of trustee of the estate cannot be enforced against this fund in the hands of its assignee for value without notice.

Notice that the assignor was a trustee and defendant to a suit for an account, in which his fund might be made answerable in case of default proved, is insufficient to affect the assignee.

APPEAL from a decree of the Supreme Court (Nov. 17, 1897) made in a suit in which the respondents were plaintiffs, and James Shepherd, Lloyd, and the appellant were defendants.

James Shepherd was a defaulting trustee of the will and codicils of William Shepherd, deceased. In a suit for an account against him brought by the respondents, a sum of money was found to be due by him to the beneficiaries under William Shepherd's will. In an administration suit of William Shepherd's estate the beneficial interest of James therein had been carried over to the credit of a separate account intituled "Account No. 4 of James Shepherd and his children." On May 24, 1895, James Shepherd mortgaged to the appellant

* *Present:* LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

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his interest in the testator's estate, specifying his interest in Account No. 4.

The respondents claimed a declaration that the money found to be due by James Shepherd was a charge on James Shepherd's interests under the will, including his interest in Account No. 4. The question was whether they had in respect of such charge a complete priority over the charge of the appellant as mortgagee of that fund.

The decree in *Shepherd* v. *Shepherd*, which declared the rights of the parties in William Shepherd's estate, was dated March 22, 1881; the decree in *Plomley* v. *Shepherd*, No. 3840, the administration suit, directing separate accounts, was dated March 29, 1888; the decree in *Plomley* v. *Shepherd*, No. 6542, brought in 1893 for an account against James, was dated May 11, 1894, the certificate of his indebtedness thereunder being dated May 5, 1896.

The mortgage deed of October 24, 1895, recited that the said James Shepherd was entitled to an estate for life in a share of the estate of his father, William Shepherd, deceased, then being administered by the Equity Court of New South Wales (suit *Plomley* v. *Shepherd and Others*, No. 3840), and particularly (but without prejudice to the above generality) to an estate for life in a sum of 5158*l.* 6*s.* 5*d.*, being the fund in the said Court of Equity standing to the credit of the above-mentioned suit, "Account No. 4. The account of James Shepherd and his children," and was also entitled to an absolute share and interest in the estate of William Shepherd, deceased, as next of kin to his three children, who had died in infancy and unmarried. The deed then assigned to the appellant all the shares and interest whether original or accruing, and whether vested or contingent, and whether in possession, reversion, remainder, or expectancy, to which James Shepherd, both in his proper right and as next of kin of his deceased children, then was or thereafter might be entitled of and in the estate of William Shepherd, deceased, by way of mortgage to secure payment of 725*l.*, lent and advanced by the appellant with interest. The deed also contained an irrevocable power of attorney from James Shepherd to the appellant (among other

things) to receive from the Equity Court the interest or income of the fund in court then or thereafter standing to the credit of the suit of *Plomley* v. *Shepherd and Others*, No. 3840, Account No. 4, and to apply to the Court for payment out to the appellant of the share of the estate of William Shepherd, deceased, to which James Shepherd was or might become absolutely entitled as next of kin of his said three deceased children.

The present claim was brought as supplemental to the statement of claim in the suit for account against James, who did not appear.

The appellant admitted that at the time of the mortgage he had notice through his solicitor that James was sole trustee, and that a suit for account was pending against him; but he submitted that his security was in no way affected thereby. He disclaimed priority except in respect of the fund in court to the credit of Account No. 4.

After the certificate of May 5, 1896, various other orders were made, and James eventually, on March 12, 1897, was ordered to pay into court to the credit of the suit 2481*l.*

The Chief Judge made a decree whereby he declared that the said sum of 2481*l.* 17*s.* 8*d.* was a charge on the beneficial interests of the said James Shepherd, and that the aforesaid charge had priority over the mortgage security of the appellant, and he awarded an injunction to restrain the appellant from receiving any money out of the said Account No. 4 until the said charge should have been fully satisfied. The grounds of the judgment were shortly that the order creating No. 4 Account was nothing more than a declaration that, so far as the partition suit was concerned, the fund might be treated as the separate property of the persons named in the heading, but that nothing could deprive it of its character of being the interest of (inter alia) James Shepherd under the will of his father William Shepherd, of which he was a trustee, that the appellant had notice of a suit specially directed against the said James Shepherd as trustee for an account which, if it brought him into default, would render everything coming to him under the will, notwithstanding any separate account or order chargeable with his debt to the estate, and that the trustee

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having in fact overpaid himself out of the rents of the estate, there was at the time when he affected to give a charge to the appellant nothing on which the charge could operate.

Swinfen Eady, Q.C., and *Terrell*, for the appellant, contended that the decree of March 29, 1888, which was made in the suit No. 3840, and constituted the Account No. 4, and the transfer of moneys to that account in pursuance of that decree took the fund so standing to the credit of that separate account out of the estate of the testator. It was divided off from the testator's estate, and belonged separately to James Shepherd and his children, free from all questions which arose in the course of the administration suit. Accordingly, at the date of the mortgage the appellant James Shepherd was absolute owner of his interest in the fund. He was enabled to deal with it as his own ascertained share of the testator's estate which had been duly appropriated to him by the Court in administering that estate. That decree and transfer of funds to a separate account, No. 4, were made in presence of the respondents. The respondents are accordingly estopped from disputing the appellant's absolute interest, free from any questions arising in the suit. The doctrine of lis pendens does not apply to the separated account. The appellant advanced his money on the specific security of James Shepherd's ascertained interest in the fund. At the time there was no actual or inchoate charge on that interest. In the suit No. 6542, asking for an account of rents and profits, the respondent, plaintiff therein, had made no charge against Shepherd, nor alleged anything that would fix a purchaser of the separate fund belonging to him with notice of a claim thereon. So far as that suit asked for administration or execution of the will and codicils of the testator, it did not in any way affect the separate fund in question. No order was made for such administration or execution. The respondent had shewn no equity to question the appellant's mortgage. The appellant took an assignment of James Shepherd's absolute interest, unaffected by any lis pendens, and without notice of any claim or charge in favour of the respondents, for none existed at the time of the

mortgage. Reference was made to *Irby* v. *Irby* (1); *In re Jervoise* (2); *Price* v. *Price* (3); *Bartlett* v. *Charles*, *In re Eyton*. (4)

Levett, *Q.C.*, and *George Serrell*, for the respondents, contended that the decree appealed from was right. James Shepherd, the mortgagor, was a trustee of the will and codicils and had defaulted. He was not entitled to take any beneficial interest under the will until he had made good the amount in which he was in default. The order made in suit No. 3840, that certain moneys should be carried over to a separate account, did not alter his position. So long as the fund remained in court it was answerable for his defaults as trustee, so far as he had any beneficial interest therein. The order was made in a partition suit, in which the sole business of the Court was to divide the proceeds of sale of the testator's estate amongst the persons entitled thereto, so that each held his share divided instead of undivided. That did not alter the nature of the title or the equities which attached to it in the suit. His interest therein remained the interest of James Shepherd under the will. The assignee could not stand in any better position than James Shepherd himself. He had notice when he advanced his money that James was a trustee, and that suit No. 6542 was pending against him for an account. He must be taken to have known that if the account brought the trustee into default, such a result would render everything coming to him under the will chargeable with his debt to the estate, and that it was none the less chargeable as against him because it had been carried to a separate account. Reference was made to *Gillespie* v. *Alexander* (5), *Greig* v. *Somerville* (6), *In re Eyton* (4), and *In re Jervoise*. (2)

Counsel for the appellant were not heard in reply.

1900
May 15.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The question in this suit arises in the administration of the estate of William Shepherd, in connection

(1) (1858) 25 Beav. 632.
(2) (1849) 12 Beav. 209.
(3) (1887) 35 Ch. D. 297.
(4) (1890) 45 Ch. D. 458.
(5) (1826) 3 Russ. 130; 27 R. R. 35.
(6) (1830) 1 Russ. & My. 338.

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with which other questions have been discussed before this Board. That gentleman, who died in the year 1855, devised his real estate to be divided amongst his wife and children when the youngest child should attain the age of twenty-one years. Each child was to take a life interest with remainder to his or her children. The testator left eight children of whom one was named James. The youngest child attained twenty-one in the year 1876. In the year 1879 James Shepherd was appointed a trustee of the will, and in the year 1882 he became sole trustee.

Francis James Plomley, the respondent in this appeal, purchased the interest of some of the devisees, and in August, 1885, he instituted a suit against James Shepherd and all the other beneficiaries, praying for a sale of the testator's land with a view to distribution of the proceeds according to the interests of the parties to be ascertained by the Court. A decree for sale was made on December 3, 1885. The suit is numbered 3840.

On March 29, 1888, a decree was made on further consideration by which it was ordered that eight separate accounts should be opened, the fourth of which was headed, "The account of James Shepherd and his children." The purchase-moneys of the testator's land were to be paid to the several accounts in certain specified proportions. And as to Account No. 4 it was ordered, "That all moneys which shall at any time hereafter during the life of the defendant James Shepherd be carried over to the credit of the said Account Number Four (4.) in respect of the interest or income arising from unpaid purchase-moneys of the said hereditaments, or otherwise received or credited to the said account in respect of interest or income, and all interest and income that may arise from the investments if any of the said moneys or any part thereof respectively which may from time to time be authorized by this Court, be paid from time to time as and when the same shall have been carried over or credited as aforesaid to the defendant James Shepherd or his duly authorized attorney or attorneys until further order." As regards some of the accounts it was ordered that nothing should be paid out of Court with-

out notice to the persons mentioned, but no such order was made to affect Account No. 4.

On September 26, 1893, the respondent and Annie Jones, who was one of the testator's children, jointly instituted a suit against James Shepherd alone. This suit is numbered 6542. The plaintiffs stated that some of the land was still unsold, and they prayed for an account of rents and profits received by James Shepherd, and so far as necessary for administration of the trusts of the will. The plaintiffs did not suggest any breach of trust on James Shepherd's part, nor did they apply for a stop order against Account No. 4 in suit 3840. On May 11, 1894, a decree was made for an account of the rents and profits of the real estate of the testator received by James Shepherd.

On October 24, 1895, James Shepherd assigned to the present appellant all his interest in the testator's estate for the purpose of securing the sum of 725*l.* and interest. The mortgage deed specifies James Shepherd's interest under Account No. 4 in suit 3840 to the credit of which there was then standing the sum of 5158*l.* 6*s.* 5*d.*; and it gives to the appellant full powers of application to the Court for procuring payment to himself. It does not mention suit 6542, but the pendency of that suit was known to the appellant.

On August 5, 1896, the Master in Equity made a certificate under the decree in suit 6542 by which he found that certain moneys were due from James Shepherd on the account of the testator's real estate to the other sharers in that estate. This certificate underwent some variations not now material to mention. By the decree made on further consideration on March 12, 1897, the liability of James Shepherd was established, and he was ordered to pay into court sums amounting to nearly 2500*l.*, and also to pay certain costs.

In the meantime, on October 31, 1896, the respondents had filed a new claim against James Shepherd and the present appellant by way of supplement to suit 6542. James Shepherd had at that time been made bankrupt, and his assignee, Mr. Lloyd, was added as a defendant to the suit. The respondents claimed the same benefits of suit 3840 as if the appellant had

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been made a defendant to it; and they claimed declarations that the sums due from James Shepherd were charges on his interest under the will, and, further, that they had priority over the appellant's mortgage.

The appellant does not claim to enforce his mortgage against any interest of James Shepherd in the testator's estate except the fund standing to the credit of Account No. 4 in suit 3840. That is now the sole question; whether, in the peculiar position in which that fund was placed by the decree of March 29, 1888, priority of charge should be given to the mortgagee of James Shepherd, or to the beneficiaries whose funds he has misapplied.

The learned Chief Judge in Equity gave the respondents a decree in accordance with the prayer of their claim. He relied on the general principle that a defaulting trustee must make good his default before he is entitled to take any part of the trust estate for his own benefit, and that his assignee cannot stand in any better position. As for the effect of the decree carrying over funds to No. 4 Account, he considered that suit 3840 was a mere partition suit, and that the order was nothing more than a declaration that, so far as that suit was concerned, the fund might be treated as the separate property of the persons named in the heading. No question of administration, he said, was or could have been raised in that suit. There was no res judicata between the parties, or, if any, it was only that James Shepherd was entitled to the income of the fund until further order. The appellant's contention that he was a bonâ fide purchaser for value is, in the opinion of the learned Chief Judge, displaced by the fact that he had notice of suit 6542.

So far as regards the liability of James Shepherd and his assignee in bankruptcy, this judgment cannot be and is not impeached. But as regards the position of the appellant, it raises a question of some subtlety and difficulty; and it appears to their Lordships to be open to the remarks which they are about to make.

As regards suit 3840, it is hardly correct to call it a mere partition suit, or to say that no question of administration was

or could have been raised in it. It is a suit for partial administration of the trusts of the will. It involved the necessity of ascertaining the legal interests of the several beneficiaries and of ascertaining and distributing the sums to which each was entitled. It also had the important effect of turning the testator's specific gifts of land into money, which on the attainment by each devisee of an absolute and indefeasible interest could and would be paid over if no claims were put forward by the others interested in the estate; who again were not entitled to receive notice of application for payment.

If, on the proposal to carry over James Shepherd's share to Account No. 4, it had been suggested that he was a debtor to the estate, inquiry would certainly have been directed, and care taken that he should not receive any part of the estate till his debt was made good. Or if it had been pointed out that he was still receiving trust funds and might become a debtor to the estate, care might and probably would have been taken either to leave his share to the general credit of the estate, or, if it were carried to a separate account, to frame the heading of that account in such a way as to shew the claim which the estate might have against the fund, or in some other way to protect it against a transfer by him.

But nothing of this kind was done. As the account stands it would lead any one to suppose that in a suit for partial administration the fund had (to use Lord Langdale's language in *In re Jervoise* (1)) been released from the general questions in the cause, and marked as being subject only to the questions arising on the particular matter referred to in the heading of the account. The right of James Shepherd to receive what was designed for him by the will was one of the general questions in the cause arising under the prayer for distribution, and not one that arose between himself and his children; and from that question his fund was released, though the release would not of itself be a bar to any subsequent proceedings which might be taken to set aside or qualify the order.

As regards the question of notice, on which the learned judge

(1) 12 Beav. 209.

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lays great stress, all that the appellant knew was that James Shepherd was trustee, and had been called on for an account in suit 6542. Every trustee is known to be subject to that liability. Of course there was the legal possibility that he might be a defaulter, and that his creditors might take steps to recall the fund placed to his separate account and make it available to answer their claim. But nothing of the kind was suggested by the frame of the suit, nor indeed could it be done except by some proceeding adapted to the legal position created by the existence of Account No. 4. In every case an executor or trustee is liable to account and may make default, the remedies for which may be worked out against his remaining interest in the testator's estate. But it would be a new thing to hold that such a possibility of itself disables an executor or trustee during the whole continuance of his executorship or trusteeship from making a good title to a bonâ fide purchaser of a separate portion of the estate which the testator has given to him.

A similar question arose in the case of *Price* v. *Price*. (1) There a trustee, having committed a breach of trust, died. A cestui que trust sued his two executors, claiming payment, and afterwards by amended bill a general administration of the defaulter's estate if his executors should not admit assets. The plaintiff registered his suit as a lis pendens in May, 1878. In November, 1878, and July, 1879, one of the executors created charges on part of the defaulter's estate specifically devised to him. In March, 1880, the plaintiff established the liability of the executors and obtained the usual creditors' decree. Sir Edward Kay pointed out that the suit was not one to administer a trust created by will for payment of debts, and that the registration of lis pendens did not indicate any purpose of making liable that portion of the defaulter's estate which had been specifically devised to and mortgaged by the executor. On that view of the case he gave priority to the executor's mortgagees.

In the case before their Lordships there was not only no

(1) 35 Ch. D. 297.

indication prior to October, 1895, of a purpose to enforce liability against the fund carried to Account No. 4, but the proceedings in the two suits when put together were such as to induce a belief that the fund appearing by the separate account to be free was really free by not being attacked in suit 6542.

Their Lordships are disposed to agree with the learned judge that it may not be quite accurate to apply the term res judicata to an order of this kind, because, though made in a suit in which one of the respondents was the plaintiff and the other a defendant, the particular question which has now arisen was neither decided nor raised. But that is hardly more than a verbal question. The important point is that the order was made in the presence of all parties interested; and its intention was to treat this fund as so far separated from the estate that it could be dealt with by the separate donees without notice to the others. That is a step forward in the administration of an estate, and it saves a great deal of expense and trouble. This fund could not be actually paid out, because nobody had acquired an absolute and indefeasible interest in it; for the absolute interests acquired by the children were liable to variation in amount by the birth of more children. But the object of separate accounts is to relieve the subjects of each account from entanglement with the others, and to make the persons specified in each heading the owners of the fund carried to its credit, so far as is consistent with the necessity for retaining those funds in court. The retention of the fund is not meant to prevent adult owners of interests in it from dealing with those interests. The division into separate accounts is intended to facilitate such dealings. Of course it is true that, so long as any fund remains in court, claims against its owners can practically be enforced against it which could not practically be enforced if it were paid out. It is open to the other parties to the suit to shew that they have claims enforceable against a separate fund which were not known or not existent when the fund was separated, and by proper proceedings to enforce them notwithstanding the order for separating the fund. But until some step is taken for that

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purpose the separation is commonly and rightly looked upon as shewing that the separated funds are free from claims by the other sharers in the estate. Persons honestly dealing with those whom the Court declares to be the owners of such funds are justified in trusting to that declaration; and their Lordships hold it to be unjust to subject them to claims by the other sharers arising out of matters subsequent to the separation or latent at the time.

They are supported in this opinion by a case which was decided by Chitty J. (1) P. E. Eyton, whose estate was being administered in the suit of *Bartlett* v. *Charles* (1), had bequeathed money to Mrs. Charles and her descendants. By the decree made on further consideration in August, 1886, a fund was carried over to an account headed "Annuity of A. P. Charles and her issue," with a direction to pay the income to her for her life. She created charges on her interest, and her creditors obtained stop orders in 1886 and 1887. In 1889 a decree was made in another suit charging the testator and Mrs. Charles jointly with breaches of a trust they had undertaken, and it was ordered that the liability should be made good out of the testator's estate. A motion was made by one of the parties to the suit of *Bartlett* v. *Charles* (1) to make Mrs. Charles's separate fund answerable in priority to the incumbrances effected by her. That application was rejected by Chitty J. on the grounds that the matter was res judicata as between the applicant and Mrs. Charles, and that the separation of the fund by the Court had given to the incumbrancers a right to believe that the fund was clear.

The learned judge below has subjected this decision to a very careful examination, and he summarises his reasons for thinking it inapplicable to the questions before him in the following terms:—

"Manifestly this case presents three serious points of difference from *In re Eyton*. (1) In the first place the charge sought there to be enforced was for an ordinary debt and not for a breach of trust: (2.) the order carrying the funds to a separate account

(1) 45 Ch. D. 458.

was made in another and entirely distinct suit: and (3.) there was no suggestion of any question of notice."

As to the third ground of difference, their Lordships have already given their views on the point of notice. As to the first ground, the distinction between debts arising out of breaches of trust and other debts seems to their Lordships immaterial to the present question. In point of fact, the claim made in *In re Eyton* (1) did arise out of a breach of trust, and we are not told by the report whether the breach was or was not connected with the property left by the testator. But how can this consideration affect the principle that the action of the Court amounts to a representation that as between the parties to the suit the separated fund is clear? If any distinction is to be drawn between the two cases with reference to the cause of the assignor's liability and to the assignee's knowledge of it, a presumption against the existence of claims connected with the estate under administration, whether entire or partial, would be stronger when a separate account has been established than the presumption against wholly independent claims. And the second ground of difference, namely, that the order establishing the separate account of Mrs. Charles was made in a separate suit from that in which her liability was established, is subject to precisely the same considerations. It is true, as the learned judge observes, that Chitty J.'s decision is not binding in the present suit. But it is one founded on a similar practice and procedure, and, as it appears to their Lordships to be sound in principle and exactly in point, they are glad to avail themselves of it.

The decision is also rested on the authority of many cases cited to shew that a trustee who has misappropriated trust funds must be taken to have received payment of his share by anticipation, and that he has nothing to assign except the excess of his share over that payment. The learned judge applies the decisions thus:—

"If these cases correctly state the principle on which the rule is founded, as I have no doubt that they do, then it would

(1) 45 Ch. D. 458.

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seem that the case of the assignee is not helped by the fund having been carried to a separate account, nor is it affected by notice or want of notice. The answer then to this case is: 'You bought the interest of a man under a will of which he was a trustee. True, his share, independently of any question of administration, was fixed at so much, and it was by order of the Court placed in such a position that it could be dealt with without reference to the other parties interested under the will, but it turns out that all the time he was entitled to nothing. He had in fact overpaid himself out of the rents of the estate, and when he affected to give you a charge, there was in fact nothing on which the charge would operate.'"

In most of these cases, such as *Morris* v. *Livie* (1), the liability enforced in priority to assignees was against portions of the estate still in bulk. The nearest to the present case is *Jacubs* v. *Rylance*. (2) In that case a Mr. Elkes was executor, and was in default. He had an interest in the estate which he mortgaged. Another fund was given to his children, and was carried over to their separate accounts. One child died, and his interest passed to Elkes. It was held that the liability to make the default good extended to Elkes's derivative as well as to his original interest. But so far is the case from deciding the present point that the report does not even mention the date of Elkes's mortgage, whether before or after the separation of the fund or the death of the child, nor the subject-matter specifically assigned by it. The sole question was whether the general principle requiring trustees to make good defaults before receiving their shares extended to derivative interests. In none of the cases was a trustee's general liability to make defaults good enforced against funds so far administered as to be carried to a separate account and specifically assigned for value by a person entitled according to the terms of that account.

The result is that the decree cannot stand so far as it is adverse to the appellant. The proper order will be to discharge the decree so far as it declares that the charges established by

(1) (1842) 1 Y. & C. Ch. 380. (2) (1874) L. R. 17 Eq. 341.

the plaintiffs against James Shepherd have priority over the appellant's mortgage, and so far as it awards an injunction against the appellant, and so far as it orders that no part of the interest accruing on Account No. 4 shall be paid to the appellant, and so far as it directs the appellant to pay costs. Instead thereof, the decree should declare that the mortgage of October 24, 1895, is as between the plaintiff and the appellant a valid security, and the first charge on the interests of James Shepherd thereby assigned; and should order that the income of the funds comprised in Account No. 4 shall be paid to the appellant until further order; and that the plaintiffs shall pay him his costs of suit. That will leave standing all those parts of the decree which relate to James Shepherd and to Mary MacGovern, and to the requisition of notice to the plaintiffs before any principal money is paid out, and to the questions reserved for further consideration.

Their Lordships will humbly advise Her Majesty in accordance with this opinion. The respondents must pay the costs of this appeal.

Solicitor for appellant: *H. T. Twynam.*
Solicitors for respondents: *P. J. Gordon & Son.*

[PRIVY COUNCIL.]

J. C.* 1900 March 21, 28; May 15.

WASTENEYS . . . . . DEFENDANT;

AND

WASTENEYS . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Husband and Wife—Deed of Separation and Annuity—Suit to set it aside—Discredited Fraudulent Representations—Subsequent Adultery of Wife—Practice as to Costs in Pauper Appeals.

A deed of separation and annuity will not be set aside at the instance of the husband on the ground of fraudulent representations by the wife as to her innocence which were discredited by him at the time of its execution, nor on the ground of subsequent adultery, when the deed contains no condition as to chastity.

Decree reversed with such costs as are payable in the colony in pauper appeals; the appellant to be entitled to such costs of the appeal as she would be entitled to according to the rule which prevails in the House of Lords, which rule is adopted by the Board.

APPEAL in formâ pauperis from a decree of the Court of Appeal (Aug. 5, 1897).

The respondent, Sir William Wasteneys, sued under the circumstances stated in the judgment of their Lordships to set aside a deed of separation dated April 27, 1891, between himself of the first part, his wife, the appellant, of the second part, and Jellicoe (a trustee) of the third part. He alleged that he had been induced to enter into the same by the fraudulent representations of the defendant that she had, while living apart from him, always led a pure and virtuous life, and in particular that she had not committed adultery with one Stephen Hutchens.

Prendergast C.J. tried the case without a jury, and gave judgment for the plaintiff. He held that in the absence of express agreement to the contrary the consideration for the said deed must be presumed to have been the release from a

* *Present:* THE LORD CHANCELLOR, LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, and LORD ROBERTSON.

supposed liability to maintain the defendant; and that she, by claiming a maintenance, represented herself as entitled to it, and as not having disentitled herself to it by adultery. And he further held that, the defendant having in fact committed adultery, the plaintiff was not liable to maintain her, and could not be compelled to do so, and that consequently the consideration which induced the plaintiff to consent to the said deed had wholly failed.

The Court of Appeal affirmed this judgment.

Stamford Hutton, for the appellant, contended that there was no finding and no evidence that the respondent believed the representations (if any) made by his wife as to her innocence. His own conduct was such that the motive for executing the deed, if any were necessary to be shewn, was not his belief in his wife's chastity, but his desire to effect a compromise and to avoid his own conduct being made public. He was not entitled to any relief. He knew the circumstances, acted under the deed, and did not stipulate that the maintenance should only be paid to his wife whilst chaste: see *Fearon* v. *Earl of Aylesford*. (1)

The respondent, in person, contended that there were concurrent findings of fact as to the appellant's adultery both before and after the deed. The evidence shewed that he signed the deed relying on her protestations of innocence, and he would not have signed it if he had known that he was in a position to resist her claim to maintenance. The evidence also shewed that the deed was obtained by the appellant in contemplation of the renewal of illicit intercourse between herself and Hutchens.

Hutton replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from an order of the Court of Appeal of New Zealand, affirming a judgment of Prendergast C.J., which declared that a deed of separation dated April 27, 1891, and made between the respondent, the

(1) (1884) 14 Q. B. D. 792.

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appellant, and a Mr. Jellicoe as trustee for the appellant, was obtained fraudulently, and ought to be set aside and delivered up to be cancelled.

The respondent married the appellant in England in January, 1875. There has been issue of the marriage six children in all, two of whom died before 1885.

In January, 1885, the respondent and the appellant agreed to live separately for the period of at least two years. A deed of separation was accordingly executed, under which the respondent bound himself to provide for the maintenance of the children and to pay the appellant 240*l.* a year. The respondent then went to New Zealand, and set up in practice as a barrister and solicitor in Auckland, leaving his wife in England. In 1887, at the request of the respondent, she joined him in New Zealand. In January, 1888, with the respondent's consent, she went to Australia on the invitation of the manager of a travelling company of actors. She remained in Australia till August, 1890. While in that country she seems to have spent much of her time in the society of a man called Hutchens. A letter of hers addressed to this man accidentally fell into the hands of the respondent. The letter was of a most compromising character, and the respondent treated it, as it was afterwards treated by both Courts of New Zealand under the circumstances, as proof positive of adultery. From the correspondence which passed between the parties while the wife was in Australia, it appears that each accused the other of adultery, and apparently with good reason. The appellant urged the respondent to obtain a divorce or to come to some arrangement which would leave her free to get her own living as a femme sole. The respondent does not seem to have been averse to such a course. The only difficulty was one of money. In August, 1890, the appellant returned to New Zealand with the object, it is said, of bringing about some final settlement. In the following November, while negotiations for this purpose were still going on, the respondent published in a newspaper called the *Reefton Guardian* a letter charging his wife with improper conduct at Brisbane. She thereupon broke off the negotiations. She consulted Mr.

Jellicoe, who was a barrister and solicitor practising at Wellington, and on January 21, 1891, she filed her petition claiming a judicial separation on the ground of cruelty and adultery. A Mr. Bell, who was also a barrister and solicitor in Wellington, acted for the respondent. The respondent prepared and swore to an answer in which he made charges against his wife of so gross a character that Mr. Bell declined to file it without more satisfactory proof of the truth of his client's allegations. A copy of the answer was, however, handed to Mr. Jellicoe. The legal advisers on both sides seem to have thought it most undesirable that the suit should proceed. They both put pressure upon their clients in order to prevent the scandal of a public trial. Ultimately terms of compromise were agreed upon. The deed of separation which is impeached in this suit was executed, and the appellant shortly afterwards went back to Australia.

It was one of the terms of the compromise that the respondent should withdraw all the charges he had made against his wife and admit that they were without foundation. Reluctantly under pressure by his solicitor he signed a letter to that effect. He handed the document to Mr. Jellicoe. As he did so he characterised it as a lie. According to Mr. Jellicoe's statement, "He said it was the first lie he had ever signed his name to." That this remark was not a hasty expression uttered in a moment of irritation is shewn by a letter written by the respondent to Mr. Jellicoe six months afterwards, in which he says, "You yourself disbelieve me solely because I put my name to that retractation, a document we both knew was false from beginning to end." It is only fair to Mr. Jellicoe to say that he seems honestly to have believed in his client's innocence, while the respondent throughout the negotiations maintained that she was guilty, and averred that he was prepared to prove it.

The deed of separation of April 27, 1891, provided for the payment by the respondent to Mr. Jellicoe of the annual sum of 240*l.* by equal monthly payments on the 20th of each month.

Beyond meeting the sums payable in April, 1891, the respondent made no payment whatever in pursuance of his covenants

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contained in the deed of separation. After some correspondence, in which the respondent pleaded extreme poverty, and proposed an alteration in the terms of the deed, Mr. Jellicoe brought an action against the respondent claiming judgment for 521*l.* 12*s.* The respondent put in a defence modelled on the propositions enunciated by Campbell L.C. in *Evans* v. *Carrington* (1), which was a very different case from the present. Thereupon, as the appellant could not furnish means to carry on the proceedings, Mr. Jellicoe was, as he says, "very glad to drop the action."

The respondent having been so far successful, followed up his advantage by bringing this action to set aside the deed of separation.

The grounds on which he relied and on which the deed has been set aside by the Courts of New Zealand are in substance these: (1.) That the respondent was induced to execute the deed by fraudulent representations that the appellant was a virtuous woman, whereas in fact, as both Courts have found, she had committed adultery; and (2.) That the appellant procured the execution of the deed with the object of enabling her to continue with impunity her adulterous intercourse with Hutchens. The learned Chief Justice rested his judgment mainly on the first ground. The Court of Appeal seem to have placed most reliance on the second.

It will be convenient, in the first place, to deal with the second ground of the judgments under appeal. The deed of separation does not contain a provision limiting the annuity during chastity. It is well settled that, in the absence of such a clause, the mere fact of subsequent adultery does not put an end to the provision for the wife. It may be that in the present case after a time—probably after a comparatively short time—the wife resumed immoral relations with her paramour. But, so far as their Lordships can discover, there is not the slightest proof that the resumption or the continuance of those relations was the object of the deed. The object of the appellant, and indeed her sole object, seems to have been to free herself from the control of a husband for whom she had neither

(1) (1860) 2 D. F. & J. 481.

affection nor respect, and to secure a certain provision for her own support.

Their Lordships have had more difficulty in regard to the first ground upon which the deed is impeached. Undoubtedly the respondent pledges his oath that when he executed the deed he believed that his wife was a virtuous woman. He says what is perfectly true, that his wife always protested her innocence. He says, too, that he and his solicitor, Mr. Bell, were influenced by the representations made by Mr. Jellicoe, who was convinced that his client had not been guilty of adultery with Hutchens. It is possible that when the respondent gave his evidence in this case he may have persuaded himself that his state of mind at the time when the separation deed was executed was such as he describes it. But that view is out of the question if any reliance is to be placed upon his word. Reviewing the whole of the evidence, and considering the letters which he wrote to his wife, to her mother, and to Mr. Jellicoe, and the statements which he made on oath in his answer to his wife's petition for judicial separation, their Lordships find it impossible to believe that the respondent was induced to execute the deed by representations as to his wife's chastity, or, indeed, that he believed in her innocence for a moment. The situation seems to be aptly described by Mr. Bell, who was called as a witness by the respondent. "I do not think," said Mr. Bell in cross-examination, "that he credited her denials any more than she credited his."

Their Lordships will, therefore, humbly advise Her Majesty that the appeal should be allowed, the order of the Court of Appeal reversed with such costs as are payable in New Zealand in pauper appeals, and the action dismissed with costs.

Their Lordships think that in pauper cases the rule prevailing in the House of Lords ought to be adopted by this Board. The appellant, therefore, will have such costs of this appeal as she would be entitled to under that rule.

Solicitors for appellant: *Royle & Co.*

[PRIVY COUNCIL.]

J. C.* 1900 *Feb.* 7, 21; *April* 6.

FALKINGHAM AND OTHERS . . . . . PLAINTIFFS;

AND

VICTORIAN RAILWAYS COMMISSIONER DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Award—Lump Sum—Evidence taken on Matters not Referred—Jurisdiction of Arbitrators.

In an action upon an award the defendants pleaded that the lump sum awarded included matters, claims, and demands in respect of which the arbitrators had no jurisdiction, as not having been referable to them under the terms of the contract between the parties:—

Held, that, as it appeared that the matters actually referred were those contained in the submission, the award was not bad (1.) on the face of it by reason that it did not state that matters not referred had been rejected from consideration; (2.) because the arbitrators had taken evidence on matters not referred, but not shewn to have been irrelevant to the inquiry, or to have been included in the award of the lump sum.

The defendants having counter-claimed in respect of liquidated damages for delays not allowed in writing by their engineer-in-chief:—

Held, that the counter-claim must be disallowed, for the refusal to allow delays was itself by the terms of the contract subject to arbitration, and a final award was by the same terms competent without sending the matter back to the engineer.

APPEAL from two decrees (March 29 and 31, 1898) of the Supreme Court dismissing the plaintiffs' appeal, and allowing the defendant's cross-appeal from a decree of Madden C.J. (Nov. 16, 1897).

The action was brought by the appellants upon an award for 19,076*l.* 1*s.* 2*d.* and 1488*l.* 15*s.*, costs made by arbitrators appointed under a contract between the appellants and the Victorian Railways Commissioners, therein referred to as "the corporation" (to whose rights and liabilities the respondent had by statute succeeded), dated December 13, 1886, for the construction of a part of the Dandenong and Leongatha Rail-

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, and LORD ROBERTSON.

way in the Colony of Victoria. The respondent, while denying the validity of the award, claimed as a set-off, or alternatively by way of counter-claim, the sum of 18,896*l.* 18*s.* 3*d.* as liquidated damages due to him under the contract in respect of delay in the execution of the works. The main questions involved in the appeal were—(i.) as to the claim, whether the award being for a lump sum is invalid on the ground that the arbitrators dealt with matters not within the submission; and (ii.) as to the set-off or counter-claim, whether upon the true construction of the contract the arbitrators had jurisdiction to relieve the appellants from the payment of the liquidated damages provided for by the contract.

The contract consisted of a specification and conditions, with a schedule shewing the quantities and rates and providing generally for the construction of the railway by the appellants, subject to the directions of the engineer-in-chief of the corporation, and for periodical payments to the appellant upon certificates to be given by him.

The material provisions and conditions of this contract are set out in their Lordships' judgment, and in particular the terms of reference to arbitration in case of dispute. The appellants did not complete the works within the time allowed by art. 85, with the result that the corporation claimed 18,896*l.* 18*s.* 3*d.* as liquidated damages. In their final return to the engineer-in-chief the appellants made seventy-five claims against the corporation. On June 29, 1892, the engineer-in-chief signed his final certificate, disallowing 71,168*l.* 4*s.* 1*d.* claimed, which included 30,625*l.* 10*s.*, being No. 66 item claiming for "loss through department not giving possession of various parts of the line within one month after the contract was signed." To this item was appended a note by the engineer-in-chief in effect refusing any extension of time.

The certificate further found that the appellants had received in progress payments 1423*l.* 18*s.* 10*d.* more than the total amount they were entitled to receive for the whole of the work done, and that in addition they were liable for liquidated damages for delay to the amount (after deducting certain allowances by way of gratuity) of 18,896*l.* 18*s.* 3*d.* The result

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of the certificate, therefore, was to shew that there was due from the appellants to the corporation the sum of 20,320*l.* 17*s.* 1*d.*

The appellants thereupon required a reference to arbitration. Arbitrators were appointed, but the respondent objected to their hearing evidence on any claims which were not referable within condition 87 of the contract. The arbitrators, however, decided to hear all the evidence which was offered, and afterwards to determine what was referable. On October 10, 1892, the arbitrators made their award, finding that the appellants were entitled to receive the sum of 20,500*l.* "freed and exempt from all deductions on account of previous payments, or of any claim for set-off, or on any other ground whatsoever." The respondent refusing to acknowledge the validity of this award, the appellants sued upon it, with the result that Hodges J. on February 13, 1895, held that the award upon the face of it shewed that the arbitrators had dealt with the sum of 1423*l.* 18*s.* 10*d.*, which the engineer-in-chief had found to have been overpaid by the corporation to the appellants, and that, this being an item not referable, the award was bad. This judgment was on May 8, 1895, affirmed by the Full Court. The case is reported both at the trial and on the appeal in 21 Vict. L. R. p. 9. The appellants thereupon, on July 27, 1896, obtained an order referring the award back to the arbitrators, who accordingly met again and heard the parties, but no further evidence; and on January 11, 1897, made the award now sued upon. By this award they awarded to the appellants the sum of 20,500*l.* to be paid by the respondent to the appellants. They further awarded that the delay or delays in the completion of the works referred to in the contract, and of the various parts or sections thereof beyond the date or dates stipulated in the contract, was or were due solely to the default or defaults of the corporation, and that the corporation was not entitled to recover from or deduct or set off against any claim by the contractor any penalty or sum in respect of such delay or delays, and they awarded that the appellants were entitled to be paid the said sum of 20,500*l.*, less the said sum of 1423*l.* 18*s.* 10*d.* found by the engineer to be overpaid as aforesaid, and ordered the respondent to pay the

costs of the previous award, 952*l.* 10*s.*, and the costs of the second award, 536*l.* 5*s.*

To the action brought on this award the respondent answered denying the validity of the award, on the ground that the arbitrators had exceeded their jurisdiction, and claimed by way of set-off and counter-claim the sum of 18,896*l.* 18*s.* 3*d.*, certified by the engineer-in-chief's certificate as due by the appellants.

Madden C.J. gave judgment for the appellants on the award, and for the respondent on his counter-claim. The Full Court gave judgment for the respondent both on the claim and the counter-claim. Those judgments are to be found in 23 Vict. L. R. 408, and 24 Vict. L. R. 4.

Sir R. T. Reid, Q.C., and *George Wallace*, for the appellants, contended that the award was valid and effectual, and warranted both by the original contract and the submission to arbitration. The respondent was not entitled under the contract of December 29, 1886, or under arts. 91 and 95 in particular, to raise the objections to the award on which he successfully relied before the Full Court. The main question was whether the appellants' delay in constructing the railway was caused by the respondent's failure to deliver the permanent-way material in time as he was bound to do by the contract. That question must be deemed both at law and in equity to have been properly submitted to the arbitrators. The award was good upon the face of it, being in respect of matters actually referred. The onus was on the respondent to impeach it, and that onus he has not discharged. The engineer's determination in regard to delay is subject to be reviewed under art. 87, and the arbitrators had power to find that the delay was solely due to the respondent's action. There was no evidence that the lump sum awarded was on account of any other delay than that for which the respondent was liable. It was not shewn by the respondent that the arbitrators had taken into consideration any matters which they ought to have excluded in arriving at their lump sum. Even if evidence had been taken outside the scope of the inquiry, that was necessary

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or may be presumed to have been necessary, unless shewn to the contrary, for the purpose of deciding what were the matters actually referred. Reference was made to *Tullis* v. *Jacson* (1); *East and West India Dock Co.* v. *Kirk* (2), as to the power to give leave to revoke a submission to arbitration where the arbitrator receives inadmissible evidence and is erring in law even in a matter which is within his jurisdiction, but otherwise it is for the arbitrators to construe the contract and decide what evidence is admissible; *Duke of Buccleuch* v. *Metropolitan Board of Works* (3), where it was held that if an award is good on the face of it, but the arbitrator has made a mistake either of law or fact on a matter within his authority, the mistake cannot be rectified, and the award is valid. Unless there was misconduct, or unless it was proved or admitted that the arbitrators had acted upon irrelevant evidence and thereby included matters outside the submission in their award, the award must stand: *Hagger* v. *Baker*. (4)

Haldane, Q.C., *Bray, Q.C.*, and *Rowlatt*, for the respondent, contended that the award was bad. On the true construction of the contract of December, 1886, the arbitrators had no jurisdiction to deal with the liquidated damages for delay. The arbitrators wrongly assumed jurisdiction to decide what parts of the claim were referable under the contract, and then awarded a lump sum in respect of the whole claim. That whole claim included items which were not in respect of matters referable under the contract. It is apparent on the face of the award and the particulars of claim that the award is partly in respect of matters not referable or referred. It was contended that, if it appears that the arbitrators have taken into consideration and have had their judgment influenced by evidence relating to matters outside the scope of their jurisdiction, the award is bad. Here the agreement to refer related to certain specified matters, and the appellants insisted upon bringing before the arbitrators matters other than those which were specified. Under such circumstances the award is bad unless on the face of it it states that matters

(1) [1892] 3 Ch. 441.
(2) (1887) 12 App. Cas. 738.
(3) (1870) L. R. 5 Ex. 221, 232.
(4) (1845) 14 M. & W. 9.

outside the jurisdiction of the arbitrators have been excluded from their consideration. See *Beckett* v. *Midland Ry. Co.* (1); *Duke of Buccleuch* v. *Metropolitan Board of Works.* (2) If a lump sum is awarded which includes compensation for matters beyond the jurisdiction of the arbitrators, the award is pro tanto void, and if the void part cannot be disentangled from the lump sum the award is void altogether. In such a case the fact that the award is good on the face of it does not cure the intrinsic invalidity. See also *Duke of Buccleuch* v. *Metropolitan Board of Works.* (3)

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The judgment of their Lordships was delivered by

LORD DAVEY. On December 29, 1886, the appellants made a contract with the predecessors of the respondent for the construction of a railway in the Colony of Victoria, which has now been completed. The important conditions of the contract for the present purpose are the 83rd, 85th, and 87th. Clause 91 should also be referred to.

By the 83rd clause it was provided that the contractor on receiving a written notice from the engineer-in-chief should from time to time suspend the whole or any portion of the works as might be directed, and such suspension should not vitiate the contract, and all claims for loss or damage caused by such suspension should be settled by the engineer-in-chief. It should be observed in passing that by the definition clause the words "engineer-in-chief" include the acting engineer-in-chief for the time being of Victorian railways.

By the 85th clause it was provided that the contractor should complete the works in sections by certain dates, the latest of which was May 1, 1889, on which day the whole of the works were to be completed. It was then provided that for each and every day's delay in the completion of each portion of the works after the days stipulated, the corporation (i.e., the commissioners) should be entitled to deduct from any moneys due or to become due to the contractor under the

(1) (1866) L. R. 1 C. P. 241. (2) L. R. 5 Ex. 221, 227; S. C. L. R. 5 H. L. 418
(3) (1868) L. R. 3 Ex. 306.

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contract, as and by way of liquidated damages, the sum of 15*l.* per working day, and if from any cause whatever, whether arising on the part of the corporation or the Government, or any officer or servant of the corporation or otherwise howsoever, the contractor should be delayed or impeded, or represent that he has been delayed or impeded, in the execution of his contract, the engineer-in-chief should inquire into such detention, assess the duration of the same, and, if he should think the cause sufficient, he would suspend the imposition of the deductions or set-off as aforesaid, and allow by writing under his hand such extension of time as he should think adequate, and at the expiration of the time so allowed the deductions or sets-off for delay should come into operation, and unless and until the engineer-in-chief should allow such extension by writing the contractor should not be relieved from his liability for such liquidated damages. Nor should the corporation be deprived of its right to deduct or set off the said damages under this condition.

By the 87th clause it was provided that all matters left to the settlement or direction of the engineer-in-chief or to be governed by his certificate, and all claims and demands of every kind of the contractor against the corporation or of the corporation against the contractor, under or arising out of the contract or for the breach or breaches thereof, should be decided by the engineer-in-chief, whose decision should be final, subject to a reference to arbitration at the instance of either party in the following cases, namely:—

All matters, claims, and demands—

(1.) Respecting any extras or alterations which, in the opinion of the engineer, are not contemplated or provided for in the contract.

(2.) Respecting any loss or damage sustained by the contractor by any error in the drawings which the engineer-in-chief deems material.

(3.) Respecting any delay, hindrance, impediment, prevention or obstruction to the contractor in the carrying on of the works: (*a*) caused by the corporation failing to give possession of the ground within thirty days from the date of the execution

of the contract; or (*b*) caused by the corporation failing to provide permanent-way materials as provided in the contract; or (*c*) caused by the engineer-in-chief suspending the works of the contract.

Their Lordships observe the restricted terms of this reference to arbitration. There is no power to refer disputes generally or even claims for breaches of contract except in specified cases. The question whether any works alleged by the contractor to be extras are or are not contemplated or provided for in the contract is left to the decision of the engineer, and it would seem that the amount only payable in respect of admitted extras is referable. Again, claims and demands in respect of delay or hindrance to the contractor are confined to those arising from the particular causes above enumerated.

By the 91st condition it was provided (so far as material) that no award should be set aside or objected to on the ground of any technical defect or error of proceeding, but that any matter made the subject of any decision of the arbitrators should be held to have been properly submitted to them, and be taken to have been properly adjudicated upon.

The works were not in fact completed until June 2, 1891. The engineer-in-chief made his final certificate, dated June 29, 1892, in which he found that the contractors had incurred liquidated damages under the 85th condition amounting (less certain sums allowed) to 18,896*l.* 18*s.* 3*d.*, and that they had been overpaid to the amount of 1423*l.* 18*s.* 10*d.*, making a total of 20,320*l.* 17*s.* 1*d.* due from them to the respondent. The certificate contains the decision of the engineer-in-chief on various claims and demands made by the contractors. The only one which has become of importance is Item No. 66. This item was intituled, "Loss through department not giving possession of various parts of the line within one month after the contract was signed," and originally 15,000*l.* was claimed. It was afterwards amended, and as amended was a claim of 30,625*l.* 10*s.* for detention for two years and three months, arising from various causes, which may be briefly summarised as follows: (1.) the contractor not being supplied with necessary plans, particularly for certain stations; (2.) all earthworks

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at a certain place being stopped by a Mr. Tulk (who seems to have been an engineer employed on the works), and the contractor not getting letter to proceed till twelve months after contract had expired; (3.) the department not giving possession of various portions of the line; (4.) failure to supply permanent-way materials in accordance with the contract. The decision of the engineer-in-chief on this claim was in the following terms:—

"The contractors were given possession of the whole of the ground included in the contract within thirty days after the execution of the contract by the contractor. Having heard the evidence placed before me by the contractor, and also by the officers of the corporation with respect to this claim, I have arrived at the decision that the contractor is not entitled to any extra payment or extension of time beyond what has already been allowed in my final certificate."

It may be inferred from a passage in the judgment of the Chief Justice that it was admitted before him that the contractors had physical possession of the ground, but it was contended that they had not effective possession, because from want of the necessary plans and other hindrances they could not make any use of the ground.

The appellants gave notice requiring an arbitration, and annexed thereto a copy of the claims made by them before the engineer-in-chief as particulars of the claims in respect of which they desired to arbitrate. In reply to an application for that purpose, the appellants on August 6, 1892, furnished further particulars of this claim. Under item 66 they gave details of the principal stoppages and hindrances complained of, which included the following:—

"All earthworks stopped from 1 m. 60 c. to 2 m. 10 c., 4th length, 16th August, 1887. Altered plans and sections sent 3rd January, 1889.

"Clearing stopped from 3 m. 60 c., 4th length to end of contract 4 m. 35 c. 26th February, 1887, until 19th December, 1888. . . . . All earthworks stopped at Korumburra end, including Korumburra station yard, and plans not received until September, 1890, sixteen months after contract time.

"Stopped for permanent way materials at all stations beyond Cranbourne."

Arbitrators were duly appointed. The respondent appointed his arbitrators under protest and subject to a reservation of the right of treating as a nullity any award upon any item other than a claim (if any) included in the 87th clause (quoting the words of the clause). The arbitrators made their first award dated October 10, 1892, whereby they awarded a sum of 20,500*l.* to be paid to the contractors by the corporation freed and exempt from all deductions on account of previous payments, or of any claim for set-off, or on any other ground whatsoever.

The contractors commenced an action on this award. The action was tried by Hodges J., who gave judgment for the defendants, and that judgment was upheld in the Supreme Court. This case is reported in the Victorian Law Reports (1), and it there appears that the learned judges held the award to be bad, on the ground that it purported to adjudicate on the overpayment of 1423*l.* 18*s.* 10*d.*, which the arbitrators had no jurisdiction to do. In their judgment the learned judges carefully explained that the only item referable was item No. 66.

By an order of July 27, 1896, it was, on the motion of the contractors, ordered that the matters referred to the arbitrators be referred back to them for reconsideration and redetermination.

The arbitrators made their second award on January 11, 1897, and thereby found and determined in respect of the matters referred to them that the contractor was entitled under the said contract to and they thereby awarded the sum of 20,500*l.* to be paid to him by the corporation, and that the delay or delays in the completion of the works referred to in the said contract, and of the various parts or sections thereof, beyond the date or dates stipulated in such contract, was or were due solely to the default or defaults of the corporation, and that the corporation was not entitled to recover from or deduct or set off against any claim by the contractor any penalty or sum in respect of such delay or delays, and that

(1) 21 Vict. L. R. 9.

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inasmuch as it appears by the certificate of the engineer-in-chief that irrespective of the allowance of the above-mentioned sum of 20,500*l.*, and irrespective of any penalties for delay or delays, the contractor has been overpaid the sum of 1423*l.* 18*s.* 10*d.*, the contractor was now entitled to be paid by the corporation the sum of 19,076*l.* 1*s.* 2*d.*, being the said sum of 20,500*l.*, less the said sum of 1423*l.* 18*s.* 10*d.*

The present action was brought by the appellants on the second award. The respondent's substantial defence is contained in paragraphs 12 and 16 of his statement of defence. In paragraph 12 he pleaded that the sum of 19,076*l.* 1*s.* 2*d.* awarded is one entire and indivisible and unseparated and unseparable sum, and the sum included matters, claims, and demands in respect of which the arbitrators had not any jurisdiction, and which were not referable to them under the terms of the contract. By paragraph 16 he pleaded that the arbitrators had no jurisdiction to deal with or disallow any claims or demands of the respondent against the appellants for set-off for delay caused by the non-completion of the works within the time mentioned in the contract. The respondent also counter-claimed for the sum of 18,896*l.* 18*s.* 3*d.*, the total amount of the deductions or sets-off for delay certified by the engineer-in-chief.

This action was tried by the Chief Justice, who found for the appellants in the action and for the respondent on the counter-claim, and gave the appellants judgment for the balance with interest. Both parties appealed to the Full Court. The appellants' appeal was dismissed with costs, and on the respondent's appeal the judgment for the present appellants in the action was discharged, and the action was dismissed with costs.

The appellants in the present appeal contend that the Chief Justice was wrong in allowing the counter-claim, and that their appeal to the Full Court ought to have succeeded, and also that the Full Court was wrong in reversing the Chief Justice's finding in their favour in the action. In other words, they claim to be entitled to the sum of 19,076*l.* 1*s.* 2*d.* without any deduction or set-off in accordance with the award.

The respondent's counsel put his argument against the award

in two ways. First, he said that it was bad on the face of it because the arbitrators had awarded on "the matters so referred" generally, whereas the mass of the matters referred were not referable under the terms of the contract and outside their jurisdiction. Secondly, he contended that the evidence shewed that the arbitrators had in fact inquired into and considered matters which they should not have inquired into at all. In support of his argument he quoted the case of *Beckett* v. *Midland Ry. Co.* (1), the judgment of Blackburn J. in *Duke of Buccleuch* v. *Metropolitan Board of Works* (2), and the opinion of Cleasby B. in advising the House of Lords in the same case. (3) Their Lordships agree that if a lump sum be awarded by an arbitrator, and it appears on the face of the award or be proved by extrinsic evidence that in arriving at the lump sum matters were taken into account which the arbitrator had no jurisdiction to consider, the award is bad. In the present case the submission is to be found in the contract between the parties and the respective appointments by them of arbitrators, and the reference was only of those claims made by the appellants which were within the terms of the submission. In *Beckett* v. *Midland Ry. Co.* (1) and the other case of *Fisher* v. *Pimbley* (4), the excess appeared on the face of the award, and, not being severable, the award was held bad. Mr. Haldane contended that this award was bad because it did not in terms state that the arbitrators had rejected from their consideration those claims of the appellants which were not properly referable, and it was therefore consistent with the award that those claims had in fact been considered by the arbitrators, and had been taken into account by them in arriving at the lump sum awarded. Their Lordships are not aware of any authority for this position, and they think it would be contrary to principle to hold an award bad because the possibility that matters not within the jurisdiction of the arbitrators may have been taken into account is not in terms excluded on the face of the award. It is true that in inferior courts the maxim "Omnia præsumuntur rite esse acta" does not apply to give jurisdiction,

(1) L. R. 1 C. P. 241.
(2) L. R. 5 Ex. 221.
(3) L. R. 5 H. L. 418.
(4) (1809) 11 East, 188.

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as was laid down by the Court of Queen's Bench in *Rex* v. *All Saints, Southampton* (1), and by Willes J. in *Mayor of London* v. *Cox*. (2) That rule is applicable to the award of an arbitrator where no jurisdiction is shewn to make the award, but where, as in the present case, there is jurisdiction to make an award, and the question is only of a possible excess of jurisdiction, it has no application. In such a case the award can only be impeached by shewing that the arbitrator did in fact exceed his jurisdiction. Their Lordships, therefore, think that this award of the lump sum is not bad on the face of it.

It was then argued that the award was shewn to be bad because it appeared from the evidence that the arbitrators had spent some days in taking evidence on the claims which were admittedly not referable. The dictum of Cleasby B. was quoted, that "a person exceeds his jurisdiction by prosecuting a judicial inquiry in a matter over which he has no jurisdiction quite independent of the judgment eventually given." This was no doubt right as applied to the circumstances of that case. But if it was intended to lay down that an award cannot be maintained whenever it is made to appear that the arbitrator took evidence on matters which turned out not to be within his jurisdiction (as contended by the appellants), their Lordships cannot agree. It may be necessary to take evidence in order to ascertain whether the matter is within his jurisdiction or not, and where the claims referred are so mixed up together as in the present case it is impossible to say that the evidence might not be received.

The circumstances in which both the first and the second awards were made may legitimately be considered. The appointment by the respondent of his arbitrators expressed the limits of their jurisdiction and the condition attached to their appointment. Before the arbitrators commenced their proceedings a protest was addressed to them by the respondent against their considering any general claims or demands for delay other than a claim within the 87th clause, the words of which are quoted in the protest. And when the arbitrators

(1) (1828) 7 B. & C. 785. (2) (1867) L. R. 2 H. L. at p. 262.

met to reconsider their award they had before them the judgment of the Court in the first action, which told them in plain words what were the limits of their jurisdiction. But we are not left to presumption or conjecture on this point. Mr. Singleton, the representative in the arbitration of the respondent, has given evidence in the action. He says that Mr. Rogers, one of the arbitrators, had had several arbitrations in relation to condition 87, and was well acquainted with it. He then says that he (very properly) read to the arbitrators the judgment of the Full Court and Hodges J. to shew that the only question before them lawfully was that of permanent-way material, and he made this plain to them. After he had read some evidence, the chairman remarked that there was other evidence which materially qualified what he relied on, but (the witness somewhat naïvely added) what the chairman referred to was immaterial. The witness afterwards said that the chairman repeated his point as to the only question referable or referred, and (the witness admitted) repeated it correctly. The arbitrators, therefore, were made fully aware of the limits of their jurisdiction, and if they disregarded them they must have done so wilfully and fraudulently. No such case is pleaded in the defence to this action.

It would no doubt have been better and more regular if the arbitrators had specified the particular claim or claims in respect of which they awarded the sum of 20,500*l*. The respondent might have asked as a condition of the first award going back for their reconsideration that they should do so, and it is a little surprising that his advisers did not take that course. But the 91st clause of the contract has some bearing on this point. That clause would not enable the arbitrators to adjudicate on matters outside their jurisdiction; but their Lordships think it does oblige them to look at the substance rather than the form, and, if they are satisfied that the award is one which the arbitrators could properly make, they should give effect to it notwithstanding any defects in form. Their Lordships are of opinion that no sufficient reasons have been adduced for impeaching the award for 20,500*l*.

There remains the question, whether the respondent should

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succeed in his counter-claim for 18,896*l.* 18*s.* 3*d.* Both the Chief Justice and the Full Court held that this matter was entirely outside the jurisdiction of the arbitrators. Their Lordships do not agree in this opinion. It appears from the note of the chief engineer on the 66th claim that he declined to grant any extension of time to the contractors. The 87th clause provides that all "matters, claims, and demands" respecting any delay arising from the specified causes may be referred. It is difficult to see why the decision of the engineer-in-chief not to allow any extra payment or to grant an extension of time on account of any delay arising from any of those causes is not, therefore, a matter which may be referred, or why it was not within the jurisdiction of the arbitrators to determine that an extension of time co-extensive with the period in respect of which the liquidated damages are claimed ought to have been granted by the engineer-in-chief. It is said that the words of the 85th clause are positive that until the engineer-in-chief allows such extension in writing the contractor is not relieved from his liability for the liquidated damages. But the 85th and 87th clauses must be read together, and if it appears that according to the true construction of the latter clause there is an appeal to arbitrators from the decision of the chief engineer not to grant an extension of time, the words in the 85th clause must mean until the engineer-in-chief (subject to appeal to arbitrators) allows such extension. It was not necessary for the matter to go back to the engineer, because it appears from the 95th clause of the contract that the arbitrators may themselves make a final award, upon which an action may be brought.

Their Lordships will, therefore, humbly advise Her Majesty that both Orders of the Full Court of March 29, 1898, and March 31, 1898, be reversed, and, instead thereof, it be ordered on the appeal of the appellants against the judgment of the Chief Justice that the respondent's claim for set-off for 18,881*l.* 18*s.* 3*d.* (the figures in the judgment) be disallowed, and that the cross-appeal of the respondent be dismissed, and that the appellants have judgment for 19,076*l.* 1*s.* 2*d.*, and also for 1488*l.* 15*s.*, being the costs of the award paid by them with

interest on the said sum of 19,076*l.* 1*s.* 2*d.*, at 5*l.* per cent. per annum from January 11, 1897, to the date of Her Majesty's Order in Council on this appeal, and that the respondent do pay the whole costs of the action and of both appeals to the Full Court. The respondent will also pay the costs of this appeal.

Solicitors for appellants: *Markby, Stewart & Co.*
Solicitors for respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

FORGET AND ANOTHER . . . . . PLAINTIFFS;

AND

BAXTER . . . . . DEFENDANT.

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ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Law of Lower Canada—Stockbroking Transactions—Civil Code, art. 1233, "*Commercial Matters*"—*Art.* 1233 (7.), *Commencement of Proof in Writing —Art.* 1233 (6.), *Notice to Produce—Authority to Stockbrokers is on Stock Exchange Terms.*

In an action by stockbrokers against their principal to recover the balance of their account in respect of sales and purchases of shares for private speculation on his account:—

Held, (1.) that these transactions were "commercial matters" within art. 1233, Civil Code, which the plaintiffs might prove by oral evidence; and that a plaintiff was a competent witness under s. 2 of 54 Vict. c. 45.

(2.) An admission by the defendant in his deposition that he employed the plaintiffs as his stockbrokers, and that they bought and sold something for him, is a sufficient commencement of proof in writing under art. 1233 (7.) to let in oral evidence of the particulars.

(3.) Art. 1233 (6.) authorizes reception of secondary evidence of bought and sold notes in possession of the adverse party without a notice to produce; and an objection thereto not taken at the trial cannot be taken in appeal.

(4.) The defendant in giving authority to the plaintiffs to do business

* *Present:* LORD WATSON, LORD HOBHOUSE, SIR EDWARD FRY, and SIR HENRY STRONG.

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on the Stock Exchange must be taken, in the absence of evidence to the contrary, to have employed them on the terms of the Stock Exchange, and, therefore, to have authorized the sale of his shares on failure to supply them with the requisite funds.

APPEAL from a decree of the Court of Queen's Bench (April 28, 1898) affirming a decree of the Court of Review at Montreal (Nov. 6, 1897), which had reversed a decree of the Superior Court, Montreal (March 18, 1897), whereby the respondent had been adjudged to pay $7491.88 to the appellants with interest and costs.

The facts of the case are set out in the judgment of their Lordships. It will be seen therein that the appellants' case was that they had entered into various stock transactions for the respondent, of which some disclosed profits in the respondent's favour and others, namely, those in Atchison Railway shares and Canada cotton shares, shewed a loss; and that they sued to recover the balance.

Upon the issues it lay upon the appellants to prove the receipt of orders from the respondent for the purchase or sale of each stock mentioned in their statement, and the actual purchase or sale by them on behalf of the respondent in accordance with such orders.

Before Pelletier J., in the Superior Court, Mr. Forget, one of the appellants, was called as a witness to prove verbal orders from the respondent. It was objected that the question was illegal, "and an attempt to prove by verbal testimony the purchase or sale of merchandise or stock involving a sum exceeding fifty dollars without a commencement de preuve par écrit and without any evidence of delivery in writing."

The judge ruled that the appellant might prove by his own testimony and by verbal evidence the whole of the transactions mentioned in the account. He gave judgment for the appellants, holding that the transactions had been proved, for that parol evidence in support of appellants was admissible, as the respondent had supplied a commencement of proof in writing by admitting that he had for several years dealt with the appellants as his stockbrokers for the purpose of similar transactions.

The Court of Review held that this admission did not constitute a commencement of proof in writing sufficient to let in verbal testimony. The Court of Queen's Bench affirmed this judgment.

Blake, Q.C., and *Horace Archambault* (Attorney-General for Quebec), for the appellants, contended that the respondent's authorization to the appellants to buy and sell on his behalf the stocks in question and the purchase and sale thereof by the appellants pursuant to such authority were commercial matters within the meaning of art. 1233 of the Civil Code of Quebec, and were provable by oral testimony. Art. 1235 of the Civil Code, sub-s. 4, does not apply, for the shares in question are not "goods" within its meaning. The relations also between the appellants and respondent were not those of seller and buyer, but of principal and agent. Even under that subsection, the respondent's acceptance and receipt of the shares are provable by oral testimony. If a commencement of proof in writing is required, it is to be found in respondent's admissions involved in the receipt of contract notes as to the relationship between him and the appellants, and in his admission that the appellants paid him money on September 22, 1891, on account of stock transactions. So also were other admissions made by the respondent as to other payments made to him by the appellants; and also an offer of settlement made by him. Also admissions that he signed and delivered to the appellants promissory notes mentioned in the declaration. This is sufficient commencement of proof in writing to let in oral evidence of purchase and sale by appellants as stockbrokers on respondent's behalf of shares bought and sold before such payments and the making and delivery of such notes. Reference was made to 9 De Lorimier's Civil Code, art. 1233, p. 537.

McMaster, Q.C., and *Goldstein*, for the respondent, contended that the rulings of Pelletier J. gave carte blanche to the respondent to prove by his own testimony and by verbal evidence the whole of the transactions mentioned in the account. This was illegal, as there was no commencement of proof in writing. There were no orders in writing from

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the respondent. It was not alleged that they ever existed. The respondent denied their existence. The appellants, who alleged that they had rendered contract notes and statements of accounts to the respondent either by mail or messenger, did not either serve the respondent with a subpœna duces tecum or his solicitors with a notice to produce them or any other documents of a like nature. As regards the argument on the other side that they were entitled to recover on the respondent's admissions, (1.) said to be contained in the receipt of contract notes and statements without protest, (2.) in his giving of promissory notes and making payments on account, and (3.) in his making an offer of settlement, it fails on each ground. As to (1.) there was no proof that they were received; (2.) the promissory notes were given without reference to any particular transactions: they were signed for the appellants at their request without explanation or any consideration and for their convenience; they could not be construed into an acknowledgment of an account not closed or a waiver of a right to proof of the transactions charged; (3.) no writing was produced in support of an alleged offer of settlement, nor was there any acceptance. Under these circumstances the appellants have failed to make any legal and sufficient proof of the transactions set forth in their account of any indebtedness of the respondent to them. Moreover, the appellants ought not to have effected any sales of the respondent's shares without his authorization, or without putting him in default to receive them. The appellants as pledgees should have followed the procedure prescribed by arts. 1971 and 1972 of the Civil Code, instead of selling at their own option and when they liked.

Blake, Q.C., replied.

1900 *May* 2.

The judgment of their Lordships was delivered by

SIR HENRY STRONG. The appeal is from a judgment of the Court of Queen's Bench in the Province of Quebec affirming a judgment of the Court of Review which reversed a judgment of the Superior Court in an action brought by the appellants against the respondent. The action was instituted to recover the sum of $7491.88 alleged to be due to the appellants, who

are stockbrokers in Montreal, by the respondent in respect of certain stock transactions in which the respondent had employed the appellants as his brokers to buy and sell shares in certain railway and joint stock companies in Canada and the United States. The respondent pleaded several defences, by some of which he denied the allegations of the appellants in their declaration. By another plea the respondent set up the defence that the transactions in question were gaming contracts, and as such illegal under art. 1927 of the Civil Code of Quebec. This defence, however, failed, and was not insisted upon either in the Court of Queen's Bench or on the present appeal.

The particulars of the appellants' demand are stated in an account produced as an exhibit in the action. It is a summary of twenty-two detailed statements of transactions in the purchase and sale of shares alleged to have been carried out by the appellants on account of the respondent between June 1, 1891, and October 3, 1894. Three only of these transactions have been made the subject of controversy on this appeal. On September 22, 1891, the appellants purchased on behalf of the respondent 100 shares of the stock of the Atchison Topeka and Santa Fé Railway Company, which were sold on October 3, 1894, at a loss of $4125 and interest. Another hundred shares of the same railway stock were bought September 25, 1891, and in the first instance debited to an account "in trust" which the appellants had opened with the respondent distinct from his personal account. These shares were, on September 14, 1892, transferred by the respondent's directions to the personal account, and on October 3, 1894, were sold at a loss of $4034.55 and interest. One hundred shares of the stock of the Canada Cotton Company, sold by the appellants for the respondent on December 8, 1891, and a like number of shares bought on December 28, 29, and 31, 1891, and January 5, 1892, at a resulting loss of $1150, form the third disputed item in the account.

Mr. Rodolphe Forget, one of the appellants, was the principal witness on their behalf. He proved the mandate from the respondent to make the sales and purchases in question, that

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express authority was given for each separate transaction, that in every case the shares were actually purchased and the scrip delivered, and that, so soon as a transaction was completed, bought and sold notes, in which the terms of the purchase or sale were fully set forth, were made out, signed by the appellants, and, after press copies had been made in a book kept by them for that purpose, at once forwarded to the respondent.

The same witness also deposed that on September 15, 1892, there being then the 100 shares of Atchison Stock included in the "trust" account, the respondent ordered these shares to be transferred to his personal account and charged accordingly, which was done. The witness also stated that on December 13, 1893, and February 16, 1894, after all transactions of purchase and sale, except the sales in October, 1894, had been closed, the respondent gave the appellants on account of his liability to them four promissory notes dated October 10, 1893, November 4, 1893, December 13, 1893, and February 16, 1894, for the several amounts of $1200, $1200, $1100, $1100 respectively, and that the two latest of these notes, which were given in renewal of the earlier ones, remained at the date of the action in the appellants' hands unpaid, and were never discounted or made use of by them. Further, it is shewn by the accounts, which are proved in detail by Rodolphe Forget, that at various times, from February 3, 1892, to November 4, 1893, cash payments were made by the respondent to the appellants. These payments, as well as the promissory notes, can only have been on account of the transactions now in dispute. For if those transactions were thrown out of the account the respondent would have been creditor, not debtor, of the appellants. The witness also stated that after the sale of the 200 shares of Atchison stock, the respondent, upon being told on the same day that the appellants had sold it, expressed no disapproval, but on the contrary said, "I will pay you the balance." It is also proved by the same witness that since the last account was rendered to him on September 12, 1895, the respondent "a good many times" acknowledged his indebtedness to the appellants and promised to pay it, that on the last occasion of his

doing so he came to the appellants' office and wanted them to accept a settlement of $1000 every three months; and generally the witness stated that the respondent never complained that his instructions had not been followed, but that he was always satisfied. In conclusion, Mr. R. Forget swore that, after having taken communication of the Exhibit 1, he persisted in saying that the account was correct, and that there was due by the respondent $7491.88, the balance there shewn.

The evidence of the appellants' book-keeper confirmed that already stated so far as it related to the delivery to the respondent of the bought and sold notes, and of the general statement of accounts.

The appellants also called the brokers in Montreal, from whom they had purchased the Canadian shares included in the account, and who proved the correctness of these transactions, and also a member of the firm of Lounsbery & Co. of New York, the brokers through whom they had purchased the American shares included in the statement on account of the respondent. This witness in particular proved the purchase of the Atchison Railway shares in September, 1891, and verified an extract from the books of his firm which was put in as evidence by consent.

Pelletier J., before whom the cause was heard in first instance, gave judgment for the appellants, holding that the transactions between the parties were "operations of commerce," that there was a sufficient commencement of proof in writing, and that therefore the oral evidence verifying the details of the account and proving the admissions of the respondent was good legal proof. This judgment was reversed by the Court of Review, one judge (Davidson J.) dissenting to this extent, that he thought the appellants were entitled to recover $2200, the amount of the current promissory notes. An appeal from this latter judgment was dismissed by the Court of Queen's Bench, Blanchet J. dissenting: except as to the lot of 100 Atchison shares bought in September, 1891, he thinking the evidence insufficient to prove that these shares were bought by the appellants on behalf of the respondent.

The points argued on the hearing of the appeal before their

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Lordships may be classed under two distinct heads. The first question was whether oral evidence could be admitted, and the second whether, if properly admitted, it was sufficient to prove the appellants' demand. Art. 1233 of the Civil Code of the Province of Quebec is as follows:—

"Proof may be made by testimony (1.) of all facts concerning commercial matters."

(And, omitting the intermediate paragraphs)—

"(6.) In cases in which the proof in writing has been lost by unforeseen accident or is in the possession of the adverse party or of a third person without collusion of the party claiming and cannot be produced; (7.) In cases in which there is a commencement of proof in writing. In all other matters proof must be made by writing or by the oath of the adverse party."

The admissibility of a party to an action to give evidence on his own behalf depended at the time the enquête in this cause was taken on the Provincial Act, 54 Vict. c. 45, the second section of which enacts as follows:—

"The following clauses are added to art. 251 of the Code of Civil Procedure, 'Any party to a suit may give testimony in his own behalf in every matter of a commercial nature and in such case be examined cross-examined and treated as any other witness. He may also be subpœnaed and treated as a witness by the opposite party and in such latter case his answers may be used as a commencement of proof in writing. The default by a party to tender his own evidence cannot be construed against him.'"

The onus was upon the appellants to prove, first, a mandate from the respondent to act for him in the several transactions which they claim to have carried out on his behalf; and, secondly, the due execution of that mandate. It appears to their Lordships that they have discharged this onus. If it be necessary to shew commencement of proof in writing so as to satisfy paragraph (7.) of art. 1233, that is to be found in the deposition of the respondent, in which, when called on behalf of the appellants, he admits that the appellants were stockbrokers, and that he employed them as his agents to transact his business; that they bought and sold "something" for him,

and that he gave them instructions to do "something" for him on the markets in New York, Montreal, and other places. This is sufficient as a commencement of proof to entitle the appellants to shew by oral evidence, or to use the language of the code by testimony, what the particular transactions were which the respondent commissioned the appellants to carry out on his behalf. But there is a broader ground for admitting proof by testimony in this case, namely, that the transactions in question are commercial matters within the provision contained in paragraph 1 of art. 1233. Neither in this nor in any other article of the code is there to be found any definition of the meaning of the term "commercial matters." It cannot be doubted that the business carried on by the appellants as stockbrokers was of a commercial nature, nor that the purchases and sales of shares by the appellants for the behoof of the respondent in the ordinary course of that business were operations of commerce. It does not appear to their Lordships that the fact that the respondent was not himself a dealer trading in shares, but that his object in buying and selling through the agency of the appellants was that of private speculation only, in any way detracts from the commercial character of these transactions as regards the appellants. Unless such a construction is adopted, very great inconvenience, if not actual obstruction, must result in the despatch of business according to the methods in general use, for it must be often impossible to obtain the strict literal proof required in ordinary civil matters. Their Lordships are, therefore, of opinion that the execution by the appellants of the respondent's commissions constituted "commercial matters" within art. 1233 which it was open to them to prove by oral evidence.

For the same reasons, namely, the commercial character of these transactions, Mr. Rodolphe Forget was a competent witness for the appellants under s. 2 of the Act 54 Vict. c. 45.

That the evidence was sufficient to establish a primâ facie case their Lordships can have no doubt. The learned judge before whom the witnesses were examined accepted and acted upon their testimony, and there is no ground for supposing that they were not in all respects trustworthy. As regards the three

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transactions in question, authority to purchase the Canada Cotton Company's shares is proved beyond doubt.

Some questions have been raised as to the two purchases of 100 shares each of the Atchison Railway stock. One of these purchases is entered in the account as having been made on September 22, 1891. Rodolphe Forget says that on September 21, 1891, the appellants were ordered by the respondent to purchase these shares, which they did through their New York brokers, Lounsbery & Co. Mr. Lounsbery, one of the firm who was examined as a witness for the appellants, produced an extract from the books of his firm, which shews that there was a purchase for the appellants' account of 100 shares of this stock on September 18 at the same price as that charged in the appellants' account. Some difficulty has been raised upon this discrepancy in dates. Even if the case had depended altogether as to this item on the evidence of the witnesses Forget and Lounsbery, their Lordships do not think this inconsistency in the dates would create any serious difficulty. It is clear that one and only one lot of 100 Atchison shares was purchased by the appellants through Lounsbery & Co. in September, 1891, at the price of $46\frac{3}{8}$. This was ascribed to the respondent at the same price, according to the notice given by the appellants on September 22. The explanation given in paragraph 28 of the appellants' case is a possible one; but, whatever may be the true explanation, it is impossible to doubt that as between the appellants and the respondent the latter had ordered 100 shares to be bought before September 22, and became entitled to these shares on September 22, and was justly debited with the price. Even if the difficulty were more substantial, it would be countervailed by the accounts delivered to and never disputed by the respondent, and his payments and other admissions of liability. The item relating to the 100 shares charged as having been transferred from the trust account to the respondent's personal account on September 15, 1892, has also been objected to as insufficiently proved. Mr. R. Forget deposes that the account in this respect is correct; that on the date in question the appellants held 100 Atchison shares in the respondent's trust

account, which on that day, "per his order," were transferred to the personal account. By this he plainly means that these shares, with the amount due in respect of the price paid for them and the commission, were simply transferred from one account to the other. This, without further particulars, was amply sufficient as primâ facie proof.

Then there is very full evidence of the respondent's admissions that the account Exhibit No. 1, comprising a detailed statement of all the transactions and bringing down the balance to September 25, 1895, was correct. Mr. Forget says the respondent admitted its correctness "a good many times," and that after all the Atchison shares had been sold he promised to pay the balance. It is also in proof that after receiving the account shewing the balance claimed the respondent went to the appellants' office and proposed a settlement by the payment of $1000 every three months. Further, the giving of the promissory notes and the payment of the two sums of $100, though of an earlier date than the rendering of the account of September 25, 1895, were all on account of the balance due by the respondent, which was due only by introducing into it these disputed transactions. In their Lordships' view these admissions proved by a witness who was considered worthy of credit by the judge in whose presence he was examined were amply sufficient to make out a primâ facie case which was not in any way displaced by the respondent. It was contended on behalf of the respondent that secondary evidence of the bought and sold notes, and of the final account delivered to the respondent, was not admissible inasmuch as no notice to produce was given. This objection does not seem to have been made at the trial, when, if it was sustainable, the omissions might have been remedied, and their Lordships are of opinion that it cannot be maintained, not only for that reason, but also for the reason that art. 1233, paragraph 6, authorizes the reception of oral proof in cases where the written proof is "in the possession of the adverse party" without adding any requirement of a notice to produce or a subpœna duces tecum in such a case. It was asserted by counsel for the appellants in answer to the objection, that it was not the practice in the Quebec Courts to give

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such notices, and, as no text of either the Civil Code or the Code of Procedure establishing such a procedure could be referred to nor any authority produced upon the point, their Lordships are of opinion that they cannot give effect to such an objection derived from the practice of the English Courts not shewn to be applicable in the Province of Quebec.

The objection based on the sale of the 200 Atchison shares which were sold by the appellants on October 3, 1894, and the proceeds carried to the respondent's credit in account entirely fails.

It is not suggested that the shares have at any time afterwards commanded a higher price, or that the respondent has suffered loss in any way by the sale. The absence of right to sell can only be made of avail to the respondent by treating the sale as a departure from and a destruction of the contract in toto, thereby relieving the respondent from his liability to pay the purchase-money. What has been argued at the bar is that the appellants were pledgees of the shares, and could only make them available for their debt by following the procedure prescribed by arts. 1971, 1972 of the Civil Code. The answer of the appellants is that the respondent has employed them as brokers to operate on the Stock Exchanges, and that the rules of the Exchanges are imported into the contracts, and that one such rule is that if the employer fails to supply his brokers with the requisite funds they may sell the shares purchased for him and reimburse themselves. That is the view taken by the dissentient judge, Blanchet J.

The same learned judge adds that the appellants could not have been in the position of pledgees, because at the time of the purchases they were not creditors, but debtors, of the respondent. That view was not examined during the argument, and the decision may be more safely rested on the wider ground.

It is true, as observed by the learned judges of the Court of Review and by Ouimet J. in the Queen's Bench, that no special usage of the Stock Exchange of New York was alleged in the pleadings or proved in evidence. But that the practice is as stated by the appellants seems to have been taken as

undisputed. Ouimet J. himself states it, and treats it as having no legal effect unless specially imported into the contract between employer and broker. Their Lordships think it a sounder principle to hold that when one employs a broker to do business on a Stock Exchange he should, in the absence of anything to shew the contrary, be taken to have employed the broker on the terms of the Stock Exchange.

Any doubt which might arise from the circumstance that the practice of the New York Stock Exchange was not put in issue is removed by the respondent's own mode of treating the sale. Rodolphe Forget states first in chief and afterwards in cross-examination what happened. The appellants asked the respondent for money many times; they kept a man running to his office nearly every day for it; failing to get it, they sold the shares and advised him the same day; he was pleased, and said, "I will pay you the balance."

The respondent gave evidence afterwards, and took no notice of Forget's statement, which stands uncontradicted. The inference must be that the respondent knew that the appellants had acted within the terms of their employment.

Their Lordships will humbly advise Her Majesty to reverse the judgments of the Court of Queen's Bench and the Court of Review with costs in both Courts, and to restore the judgment pronounced by Pelletier J. in the Superior Court.

The respondent must pay the costs of this appeal.

Solicitor for appellants: *S. V. Blake.*
Solicitors for respondent: *Rowcliffes, Rawle & Co.*

[PRIVY COUNCIL.]

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ROYAL MAIL STEAM PACKET COMPANY . . . . . } DEFENDANTS;

AND

GEORGE & BRANDAY . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Jamaica Code of Civil Procedure, s. 438—*Question of Fact not submitted to Jury—New Trial—Issue of Fact as to Variation of Easement claimed.*

In an action by the respondents for damages in respect of a nuisance committed by the appellants and for an injunction, it was alleged that the appellants, who had a prescriptive right to load, unload, and store coals on their wharf in such manner as to spread their coal dust over the respondents' wharf, had within twenty years so extended the site of their operations and altered the structure of their works and the conduct of their business as to produce injurious effects not covered by any prescriptive right. The question submitted was whether the appellants' works taken as a whole had by their extension been rendered more injurious than before to the respondents' works taken as a whole. The jury found that there had been no increase in inconvenience and discomfort to the respondents, and a verdict was entered for the appellants. On motion before the Full Court judgment was given for the respondents, on the ground that the change in the incidence of the dust produced by the extension and alteration of site and works so altered the nature of the easement as to constitute a new wrong:—

Held, on appeal, that the question whether by this extension and alteration there had been a variation in the kind of servitude imposed on the respondents substantial enough to cause a new and appreciable wrong was a question of fact which had not been submitted to the jury, and that there must be a new trial.

Under s. 438 of the Jamaica Code of Civil Procedure the Court cannot decide a question of fact never submitted to the jury, though it may draw inferences of fact not inconsistent with the findings.

APPEAL from a decree of the Full Court (Feb. 3, 1898) setting aside a judgment of the Chief Justice (Oct. 8, 1897), which at the trial of the action had been entered for the appellants.

The question decided in this appeal was one of procedure, whether the Full Court, in the circumstances of the case, which

* *Present:* THE LORD CHANCELLOR, LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, and LORD ROBERTSON.

are fully stated in their Lordships' judgment and on the findings of the jury, were justified, having regard to s. 438 of the Code of Civil Procedure (40 of 1888), in giving judgment in favour of the respondents, or whether they were bound to direct a new trial.

The Chief Justice at the trial left the following questions to the jury:—

(1.) Having regard to the locality of the respondents' wharf and the general nature of the neighbourhood, did the respondents at the date of the writ suffer substantial inconvenience and discomfort in the use and employment of their wharf premises by reason of coal dust issuing from the appellants' wharf premises, and from vessels lying thereat?

(2.) Had the inconvenience and discomfort as suffered by the respondents at the date of the writ, or previously thereto, been materially increased by any or all of the following causes:—

(*a*.) The unloading of coal from vessels lying at the appellants' new pier, including all operations incidental to the storage of such coal? (*b*.) The loading of coal into vessels lying at the appellants' new pier, including all operations incidental to the transfer from the place of storage? (*c*.) The transfer of coal direct from one vessel to another at the appellants' new pier? (*d*.) The extension in a southerly direction of the appellants' place of storage for coal after the erection of their new pier? (*e*.) The discontinuance by the appellants after the erection of their new pier of the use of water in watering their coal at the place of storage?

(3.) Was the inconvenience and discomfort so suffered by the respondents at the date of the writ substantially greater than the inconvenience and discomfort from the same cause suffered by the respondents and their predecessors in title during the period of twenty years immediately preceding the date of the writ?

(4.) What damage had the respondents suffered at the date of the writ from any increase in the inconvenience and discomfort in the use and employment of their wharf by reason of coal dust issuing from the appellants' premises since the erection of their new pier?

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The jury answered the first question in the affirmative, and all the other questions in the negative, and accordingly the Chief Justice entered judgment for the appellants with costs.

The respondents then moved before the Full Court of the Supreme Court of Jamaica that this judgment should be set aside and entered for the respondents; or, in the alternative, that the findings of the jury in answer to all the questions put to them except the first, and the judgment obtained on such findings, should be set aside and a new trial ordered on the following amongst other grounds :—

(1.) That on the undisputed facts the respondents were entitled to judgment. (2.) That the new pier of the appellants was not clothed with the prescriptive right or easement (if any) attaching to the old pier. (3.) That the right (if any) to cause a nuisance to the respondents' wharf premises by loading and unloading coal, with the incidents attached thereto, at the old pier did not extend to the appellants' new pier. (4.) That the new pier was a substantial alteration and addition to the appellants' wharf premises both as to form of structure and locality. (5.) That as the right or easement (if any) attaching to the appellants' old pier was not extinguished, if such right also attached to the new pier, then the injuria of the respondents had been increased (but for the question of prescription) even though there might not have been a substantial increase of their damnum. (6.) That the place or places of loading and unloading being materially different on the new to what they were on the old pier, there had been necessarily a corresponding change in the incidence of the coal dust on to the respondents' premises apart from any question of the quantum of such coal dust. (7.) That the right or easement (if any) acquired by the appellants by twenty years' user did not extend to or against the new pier erected by the respondents on their premises since the year 1890. (8.) That the findings of the jury on the questions put to them (other than the finding on the first question) were contrary to the evidence and against the weight of the evidence. (9.) That certain evidence had been improperly rejected.

The Full Court adopted the view put forward in the sixth

of the above grounds of motion, ordered that the judgment entered for the appellants be rescinded and set aside, and that the appellants, their servants and agents, be perpetually restrained from using the new or extended pier of their wharf premises so as to occasion to the respondents a nuisance by coal dust passing over and falling upon the respondents' wharf premises from the said new or extended pier or from vessels lying thereat.

Swinfen Eady, Q.C., *Norton, Q.C.*, and *C. T. Simpson*, for the appellants, contended that this order was wrong, and that they were entitled not merely to a new trial, but to have the rescinded judgment restored. The Full Court based its decision on the ground suggested in No. 6 of the above notice of motion. It proceeded on the assumption that the allegations of fact as to the incidence of coal dust on particular parts of the respondents' wharf premises as distinguished from the whole of such premises, which are implied in the sixth ground of the respondents' motion before it, were raised by the pleadings and proved by the evidence at the trial. But the only grievance complained of in the statement of claim was the alleged spreading of coal dust from the appellants' wharf premises as a whole over the respondents' wharf premises as a whole. At the trial, also, it appeared that they complained merely of an increase in the inconvenience and discomfort they suffered at their wharf premises as a whole. The only questions submitted to the jury had reference to the inconvenience and discomfort alleged to be suffered by the respondents, and in the use and enjoyment of their wharf premises as a whole by reason of coal dust affecting those premises as a whole.

If the respondents' statement of claim had contained any such statement or allegations, the appellants would have been prepared to adduce evidence for the purpose of shewing that there had not since the completion of their new pier been any substantial change in the incidence of coal dust on any part of the respondents' premises as distinguished from the whole of such premises. Though no issue was raised to that effect, yet the evidence given at the trial shews that since the completion

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of the appellants' new pier the total quantity of coal dust carried by the wind to the respondents' wharf premises has been very greatly diminished. It also tends to shew incidentally that there has not been any change of a substantial character in the place of incidence of such coal dust as may still be carried to the respondents' premises. The reasonable conclusion from the evidence given at the trial is that the recent inconvenience and discomfort of which the respondents complain has arisen to a great extent if not altogether from accidental and temporary causes. These no longer affect the appellants' operations. They referred to such matters as the occurrence of drought which for some time rendered it impossible to water the coal before moving it, and the impossibility of ascertaining otherwise than by experiment what would turn out to be the most satisfactory mode of dealing with coal at the new pier. Even assuming that the quantity of coal dust incident at particular parts of the respondents' wharf premises may occasionally have been greater after than it had been before the completion of the appellants' new pier, there was no evidence that any such increase of inconvenience and discomfort was of so substantial and permanent a character as to entitle the appellants to an order for an injunction.

Sect. 438 of Law 40 of 1888 does not authorize the Court to decide without the assistance of a jury issues of fact which if relied upon ought to have been raised and submitted to the jury at the trial. The necessary conclusion from the verdict is that the appellants are entitled to the enjoyment of the only easement over the respondents' wharf premises, their title to which was questioned either in the respondents' statement of claim or at the trial. As to the appellants' right to immediate judgment, see *Macdougall* v. *Knight* (1); *The Tasmania* (2); *Milissich* v. *Lloyds* (3); *Thomas* v. *Thomas* (4); *Harvey* v. *Walters* (5); *Baxendale* v. *McMurray* (6); *Sturges* v. *Bridgman.* (7)

(1) (1889) 14 App. Cas. 194.
(2) (1890) 15 App. Cas. 223.
(3) (1877) 36 L. T. 423.
(4) (1835) 2 C. M. & R. 34; 41 R. R. 678.
(5) (1872) L. R. 8 C. P. 162.
(6) (1867) L. R. 2 Ch. 790.
(7) (1878) 11 Ch. D. 852, 864.

Cohen, Q.C., and *Ernest M. Pollock*, for the respondents, contended that the judgment of the Full Court should be affirmed. The prescriptive right to cause a nuisance to the respondents' wharf premises by loading and unloading and storing coal, with the incidents attached thereto, did not extend to the appellants' new pier or extension. The new pier was a substantial alteration and addition to the appellants' wharf premises, both as to form of structure and locality, and there is no ground for saying that it is clothed with the prescriptive right (if any) attaching to the old wharf premises. The addition did not form a part of the dominant tenement. If the right or easement which attached to the old premises were extended to the new, the burden thereof on the respondents was increased far beyond what the appellants were entitled to by prescription. A great deal of evidence given at the trial of the action was directed to the question whether there had been an increase in the inconvenience suffered by the respondents from coal dust coming from the appellants' wharf premises and vessels since the erection of their new pier, and the change in their manner of loading, unloading, and storing coal. It was contended that, although this evidence did not determine all the issues raised in the case, the Supreme Court was right in exercising its power under s. 438 of the Civil Procedure Code, and in drawing an inference of fact. The evidence fully justified the inference drawn, namely, that the incidence of the coal dust upon the respondents' premises from loading and unloading steamers and storing coal had been materially shifted since the erection of the appellants' extension to their pier. Such an inference of fact was not inconsistent with the findings of the jury and was within the powers of the Court. The facts which justified the inference were that after the extension made in 1896 (*a*) there was a change of direction and incidence of the coal dust arising from the store-heap of coals on the appellants' wharf premises in consequence of such extension; (*b*) that the coal dust from the appellants' wharf premises arose from a point where it had not arisen prior to the said extension; (*c*) that coal was carried along the wharf premises over a greater distance to and from the store-heap of coal in

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consequence of the said extension; (*d*) that since the extension, coal was carried across the upper floor of the wharf premises when coaling direct from the collier, and that the upper floor of the extension was covered with coal dust, and that the heaps of coal for loading were changed in direction and position.

Although the jury found that at the date of the writ the respondents did not suffer substantial inconvenience and discomfort in the use and employment of their wharf premises by reason of the coal dust from the appellants' wharf; yet the Court's inference was justified that the incidence of it upon the respondents' premises was shifted, and consequently that the nuisance inflicted was no longer covered by the prescription: see *Ivimey* v. *Stocker* (1); *Luttrel's Case.* (2)

Eady, Q.C., replied.

1900 *May 2.*

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The respondents in this appeal sued the defendants, now appellants, for damages in respect of a nuisance committed by the latter, and for an injunction to restrain its continuance. The action was tried before Clarke C.J. and a special jury in October, 1897. Certain questions were submitted to the jury, and upon their answers the learned Chief Justice entered verdict and judgment for the defendants with costs. The plaintiffs then moved the Full Court, consisting of the Chief Justice and Northcote and Lumb JJ., to have the judgment entered for themselves, or in the alternative for a new trial. The learned judges all considered that the plaintiffs were entitled to judgment, which was entered accordingly on February 3, 1898. From that judgment the present appeal is brought.

The defendants ask that the verdict and judgment entered for them at the trial may be restored, or at all events that the judgment of February 3, 1898, may be set aside, and a new trial ordered. It appears to their Lordships that the decision of this appeal must be confined to the question whether the case has in effect been submitted to the jury; and for the

(1) (1865) 2 Dr. & Sm. 537. (2) (1601) 4 Co. 493.

purpose of deciding that question it is necessary to state with some particularity the issues raised on the record and the proceedings at the trial.

The plaintiffs and defendants respectively are owners of wharves abutting on Kingston Harbour, and separated only by the width of Duke Street, which runs substantially north and south; the wharf of the plaintiffs being on the west side, and that of the defendants on the east. From the year 1841 onwards the defendants have kept stores of coals on their wharf, and it is common ground between the parties that the loading and the unloading of the coals has constituted an annoyance to the plaintiffs or their predecessors in title which the defendants have by more than twenty years' user acquired a prescriptive right to continue. The action is founded on allegations of alterations in the structure of the defendants' works and in the conduct of their business which, as the plaintiffs contend, produce injurious effects not covered by any prescriptive right.

In the fourth paragraph of their claim the plaintiffs allege that within the last twenty years the defendants have largely increased the quantities of coal stored on their wharf, and the quantities unloaded from and loaded into vessels lying at their pier, and have extended the place of storage 200 feet southwards. By paragraphs 5 and 6 the plaintiffs allege that the defendants have within the last twelve months, namely, in the year 1896, extended the pier of their wharf 250 feet southwards, and have since loaded and unloaded coal at points 250 feet further south than they did previously. In paragraphs 7, 8, and 9, the plaintiffs go on to state the consequences of this alteration. Instead of loading and unloading in baskets carrying small quantities, the defendants do it by trucks carrying large quantities emptied at a great height (paragraph 7). They have discontinued watering their coals, which they used to do previous to the extension (paragraph 8). They unload coal at a height of twenty feet above their previous level (paragraph 9). The grounds of action are summed up in paragraphs 10 and 11, which run as follows:—

"By reason of the matters stated in paragraphs 4 to 9 hereof,

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the defendants from the 1st day of September, 1896, to the present time have wrongfully caused large quantities of coal dust to issue and proceed from their said wharf premises and the vessels lying thereat.

"The said coal dust spread itself over the plaintiffs' wharf premises, and destroyed and damaged the goods of the plaintiffs on their said wharf premises, and damaged the buildings thereon and vessels lying thereat, and rendered and render the house thereon unwholesome and uncomfortable to live in, and the said wharf premises unwholesome and uncomfortable to occupy and unfit for use."

In their defence the defendants deny the statements in paragraphs 4, 7, 8, and 9. Paragraphs 5 and 6 are not denied. They meet the legal claim raised in paragraphs 10 and 11 as follows:—

"The defendants deny each and every of the several allegations made by the plaintiffs in paragraphs 10 and 11 of the statement of claim, and say that, in the due performance of their duty as wharfingers and as charterers and owners of vessels loading and unloading coal on their wharf the quantities of coal dust that issue from their wharf premises are incidental to their said business, and are in accordance with their right, enjoyed for a period of twenty years and upwards in the loading and unloading of such vessels, and the inconvenience suffered by the plaintiffs (if any) is not in the nature, extent, and character thereof other than that heretofore suffered and allowed by the plaintiffs and their predecessors in title for twenty years and upwards, and is of a character necessary to the incidents of the business carried on by the defendants."

In joining issue on this defence the plaintiffs made admissions to the effect that the increases of quantities alleged in paragraph 4 of the claim had not taken place. Upon that admission there remained no express allegations of damage to the plaintiffs by reason of the defendants' extension of their pier, except those contained in paragraphs 7, 8, and 9.

It is not mentioned in the pleadings, but it was shewn by the evidence, that in or about the year 1890 the plaintiffs also enlarged their works, carrying them further to the south. The

Chief Justice speaks of this as a fact which, although disclosed, was certainly not relied upon at the trial, namely, that the nuisance complained of in part falls upon the portion of the plaintiffs' wharf and pier which were added by them since they purchased.

It is rather unfortunate, especially with reference to the point on which the case ultimately turned, that no plan of the locality has been put in evidence. One was tendered, but for some reason was not received; perhaps, as the respondents' counsel suggests, because it was not sufficiently accurate. A copy was shewn to their Lordships during the argument, and it helped them to understand some points in the case; but it is not evidence.

At the trial the course of the controversy seems to have been in accordance with the state of the pleadings. It resulted in the submission of four questions to the jury, to which they returned separate answers. The first question was whether the plaintiffs suffered substantial inconvenience and discomfort by reason of the coal dust raised by the defendants; and the answer was in the affirmative. The second question was whether the plaintiffs' inconvenience and discomfort had been materially increased by any of five specified causes, all relating to the injurious consequences alleged in the plaint to have resulted from the new pier; and the answer to each was in the negative. The third question was whether the inconvenience and discomfort to the plaintiffs at the date of the writ was substantially greater than in the preceding twenty years; and the answer was in the negative. The remaining question related to damage from increase in inconvenience and discomfort; and the jury found there was none.

In his judgment on the plaintiffs' motion to set aside the verdict, the learned Chief Justice has given a full and clear account of the proceedings before him. Before stating it it will be convenient to shew the grounds on which the plaintiff moved the Court. Some heads refer to the evidence and need not be specified. Heads 2 to 6 rest entirely on the alteration in the legal position of the case caused by the erection of the defendants' new pier. They are to this effect: that the prescriptive right acquired for the old pier does not extend to

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the new; that as the places of loading and unloading were changed, there was necessarily a corresponding change in the incidence of the dust; and that, as the right attaching to the old pier was not extinguished, the injuria of the plaintiffs has been increased, even though there has been no substantial increase of damnum. They also raise the point that the prescriptive right of the defendants does not extend to the new pier of the plaintiffs.

Their Lordships now proceed to extract the material passages from the judgment of the learned Chief Justice. He says:—

"The case opened for the plaintiffs at the trial was, that since the defendants' new pier came into use the coal dust on their premises increased to such an extent that what was previously a trifling inconvenience had become a serious nuisance. Their complaint was not confined to the dust coming from the new pier, but embraced the methods of handling and storing the coal pursued by the defendants since the new pier was brought into use, nor was it limited to altered conditions on any particular part of their own premises. Not only was it alleged that there was more dust on their pier and new stores (Nos. 1 and 2) to the south, but the old stores (3 and 4 and 5), the office and residence, and the logwood yard were all said to have suffered by the change, and even Store No. 6, to the extreme north, was shewn to the jury as being subjected to the new nuisance. The jury were asked to give damages for a general increase in the inconvenience extending over the whole of the plaintiffs' premises."

Then, after shewing that when the defendants had ineffectually contended that there was no nuisance at all, they satisfied the jury that there was no more than existed before the erection of their new pier, and that after a very lengthy hearing the counsel agreed to forego their addresses to the jury, he proceeds:—

"Before summing up I stated the questions which seemed to me to involve everything in dispute, and which are those afterwards left in writing. It was not then suggested that there was any other separate question as regards the defendants' new pier, nor that, as the nuisance in part proceeded from it, there was no evidence to support the defendants' plea of prescriptive

right. Though the plaintiffs' evidence seemed directed to prove an increase in the quantum of dust coming to all parts of their premises, the jury were told that, assuming the inconvenience amounted to a nuisance, if the plaintiffs' premises were rendered less convenient by a change in the incidence of the dust since the alteration of the defendants' premises, there would be an actionable wrong whether the amount of dust received were greater than before or not. They were not, however, directed that a change in the incidence, without reference to the question of inconvenience, would in itself constitute a new wrong."

At this stage, then, it was that the jury gave the answers which have been stated above; and nothing can be clearer than that the point to which their attention was confined was this—whether the defendants' works taken as a whole were after the erection of their new pier more injurious than before to the plaintiffs' works taken as a whole. The judge and the counsel were in accord on this point.

After this came the first indication of the point on which the judgment ultimately turned. The learned Chief Justice continues:—

"After the jury returned their answers, the plaintiffs' counsel moved for judgment on the first finding, on the ground that the defendants' extension was a new structure, and, although no argument was submitted, I understood that he then, generally speaking, took up the position expressed in the second, third, and fourth grounds of the present appeal."

That raised the question whether the prescriptive right acquired for the defendants' old pier extended to the new. The learned Chief Justice referred to the statement in the plaintiffs' claim in which the new pier was described as being part of the defendants' wharf premises in which they had for many years carried on business, and he concludes thus: "It seemed to me that it was not open to the plaintiffs to treat the new pier as not being upon the dominant tenement, and, no other question being raised, I give judgment for the defendants."

The only point then raised at the trial, after the disposal by the jury of the question of increase in the nuisance, was whether

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the defendants' extension was part of the dominant tenement. On the appeal the Chief Justice adhered to his opinion that this question was not open on the pleadings. It is to be remarked, however, that Lumb J. decides this question in favour of the plaintiffs on the ground that the defendants had only recently acquired the site of the new pier, and uses it in answer to the defendants' contention that, as regards the extent of the prescriptive right or of presumption of grant from user, no distinction can be taken between one part of the property and another. It is said at the bar that the learned judge was mistaken as to the defendants' acquisition of the site. However that may be, the question is one of fact, and it was not submitted to the jury, nor was it the subject of controversy till the trial was practically finished. So that, independently of the objection arising from the state of the pleadings, the fact which appears to be the candid point of Lumb J.'s decision has never been ascertained.

The reason given by the learned Chief Justice for his judgment on the appeal was founded upon the sixth head of the plaintiffs' grounds of appeal, namely, that there was necessarily a change in the incidence of the coal dust on to the plaintiffs' premises. This, as he considers, so alters the nature of the easement that a new wrong was done to the plaintiffs.

Northcote J. takes the same view. He agrees that the defendants' extension was treated by the plaintiffs as part of the pre-existing wharf, and not as new premises creating a new nuisance, and that it was not open to them to treat it differently on appeal. He thinks that the issue raised by the sixth head of appeal was sufficiently raised on the pleadings by the plea of the defendants that the nature, extent, and character of the nuisance was not altered, and by the plaintiffs joining issue thereon. He points out that the parties at the trial appear not to have known what were the precise issues they were fighting about, with the result that the jury had no question before them except that of increased damage. But he holds that in respect of the plaintiffs' extension of their wharf a new wrong had arisen.

Lumb J., as before stated, takes a different view of the defendants' extension. He rests his decision on the failure of

the defendants to prove a prescriptive right to load and unload at the new pier. He does not address himself specially to the question whether it was open to the plaintiffs to raise such a point in appeal, and he decides for himself without evidence an incident which materially affects the question. Their Lordships consider that the view of the two other learned judges on this part of the case is the sounder one.

With regard to the point on which they rest their judgment—namely, the incidence of coal dust on the new works of the plaintiffs—Mr. Pollock drew attention to several passages in the evidence with the view of shewing that such new incidence was substantial and injurious. Whether the evidence does or does not lead to the inference that a substantial new wrong has been caused by the plaintiffs is a point which ought to have been brought before the jury and decided at the trial; and as it was not so, the question is reduced to this, whether the Court is justified in deciding it upon appeal. They have answered that question in the affirmative on the construction of s. 438 of the Civil Procedure Code, by which the Court is allowed to draw all inferences of fact not inconsistent with the findings of the jury, and if satisfied that it has before it the materials necessary for determination may give judgment. The findings of the Court in this case are not inconsistent with any of the findings of the jury. The question remains whether the Code enables the Court to decide questions of fact never submitted to the jury at all.

This matter was carefully examined in the case of *Milissich* v. *Lloyds* (1), which was decided in the year 1877. It turned on the construction of Order XL., r. 10, made under the English Judicature Act of 1875. That rule corresponds with the Jamaica rule, and the same body of common law underlies both. The plaintiff in the action claimed damages for libel. The libel alleged was contained in a pamphlet published by Lloyds purporting to give a report of a trial in which the plaintiff and another were charged with conspiracy. The plaintiff was abroad; the other defendant was tried and convicted. It was held that the report was in its nature privileged, and the question then was whether it was fair or unfair. The

(1) (1877) 36 L. T. 423.

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complaint against it was that the defendant had reported the speech of the prosecuting counsel and the summing-up of the judge, but not the evidence, nor the speech of the counsel for the defence. Coleridge C.J., who presided at the trial, directed the jury that the report could not be fair because it did not present the case as a whole, but only gave part of it; and on that direction the jury found a verdict for the plaintiff.

The defendants moved to have judgment entered for themselves, on the ground that there was no evidence to shew that the report was unfair. The Court of Common Pleas, of whom Lord Coleridge himself was one, declined to enter a verdict for the defendants; but they directed a new trial, apparently on the ground that the judge's direction to the jury could not be supported, and that the question of fairness or unfairness had not been submitted to the jury.

The defendants then raised the same contention before the Court of Appeal, and they relied on the rule which has been referred to. Mellish L.J. said that, though the terms of the order were very general, "it was clearly not intended by the Legislature that the Court should take advantage of that general rule to take away questions from the consideration of the jury which are questions of fact properly for their consideration." It was argued that the evidence was all one way, and that a new trial would be useless, because no jury could reasonably find the other way. But he answered that the jury are the judges of the credibility of witnesses, and also of the general inference to be drawn from all the facts. Brett L.J., dealing with the argument that the Court ought not to send the case to trial again if satisfied that the evidence is so strong that no jury ought to find against it, applies the rule thus: "If at the trial the judge according to law was bound to direct the verdict to be entered for the plaintiff, we are bound to direct it to be entered in the same way." The appeal was dismissed.

In the present case the plaintiffs support their injunction on the ground that, owing to the extensions of the works, there has been a variation in the kind of servitude which the defendants claim to impose upon them substantial enough to constitute a new wrong of appreciable amount. That is clearly a question for the jury. Owing to the way in which the works

of each party were treated as a whole, that question was never put to the jury; probably it was never suggested at all during the trial in any such way as to bring out the separate considerations relating to the new works. However that may be, the defendants say they are entitled to have the opinion of a jury upon their liability. Their Lordships hold them to be so entitled, and for that purpose a new trial is necessary.

The defendants ask for more—namely, to have judgment entered in their favour. They urge with some force that the plaintiffs' claim is grounded on the increase of nuisance, and that, if the plaintiffs were dissatisfied with the questions put to the jury, they ought to have objected. Their Lordships, however, think that there has been enough of common misapprehension to make it unreasonable to visit on the plaintiffs the whole consequences of the miscarriage which has undoubtedly occurred. They think that the proper decree will be to discharge the order of February 3, 1898, except so far as it directs that the judgment entered for the defendants on October 8, 1897, shall be rescinded and set aside, and instead of the portion discharged to direct a new trial of the cause, with liberty for either party to apply for amendment of the pleadings as they may be advised. The costs of all the proceedings should abide the event of the new trial. Their Lordships will humbly advise Her Majesty to order to that effect. In this appeal the defendants have succeeded in discharging the judgment entered for the plaintiffs, and have failed in getting one entered for themselves. The appeal, however, was necessary for the purpose of displacing the judgment entered up against them and obtaining a new trial. There is nothing in the record which is not proper for that purpose; and it is difficult to suppose that the costs can have been in any way incurred by the not very long addition to the argument founded on the same materials. The case is one in which it is fair that the respondents should pay the costs, and their Lordships order accordingly.

Solicitors for appellants: *Wilson, Bristows & Carpmael.*
Solicitor for respondents: *H. F. Pollock.*

[PRIVY COUNCIL.]

J. C.* 1900 May 22.

QUINLAN . . . . . PLAINTIFF;

AND

CHILD . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL OF THE WINDWARD ISLANDS.

QUINLAN . . . . . PLAINTIFF;

AND

QUINLAN . . . . . DEFENDANT.

Ex parte QUINLAN.

ON APPEAL FROM THE ROYAL COURT OF ST. LUCIA.

Practice—Special Leave to Appeal—Appeal in formâ pauperis.

Where a petitioner had obtained leave to appeal in regular form, an order granting leave to prosecute it in formâ pauperis was made.

On petition for special leave to appeal (1.) from a decree in a matrimonial separation suit, (2.) in a mortgage suit, (3.) from an order for execution of the last-mentioned decree:—

Held, that there being ground for appealing from the mortgage decree, the leave should be extended to both suits, which were mixed up together.

Their Lordships have no jurisdiction to order a stay of sale in execution.

THESE were petitions by John Edward Quinlan for special leave to appeal. In the first he alleged that he had sued the respondent as Chief Justice of St. Lucia for 500*l.* damages, to which the defendant filed a demurrer and defence, with the result that the petitioner was non-suited by the Acting Attorney-General sitting as judge. The Court of Appeal for the Windward Islands dismissed the petitioner's appeal, and granted leave to appeal to Her Majesty in Council, but refused leave to appeal in formâ pauperis on the ground of jurisdiction. The prayer was for special leave to appeal in formâ pauperis for judgment or a new trial, on the ground that the petitioner had not been able to obtain a fair hearing, and in consequence of all his

* *Present:* LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, SIR HENRY DE VILLIERS, and SIR FORD NORTH.

property having been levied upon by order of the respondent he was totally without means and unable to find sureties.

In the second petition he alleged a suit by his wife for separation from bed and board, and that judgment was given therein by Child C.J. on July 20, 1899. He also alleged another suit by the respondent claiming 1735*l.* 16*s.* 9*d.*, principal and interest, on a mortgage granted by him for 1300*l.*; and a third suit, called an action of improbation, by the petitioner impugning the mortgage. Further, that judgment was given on December 21, 1899, by Child C.J. against him on the mortgage suit, and that on the same day the respondent entered an appearance to the action of improbation; that on February 7, 1900, Child C.J. ordered execution of the decree, and that a sale was ordered for May 26. The prayer was for special leave to appeal in formâ pauperis from the judgments and orders of Child C.J. dated July 20, 1899, December 21, 1899, and February 7, 1900, and that the advertised sale should be stayed pending appeal.

Sydney C. N. Goodman, for the petitioner.

The judgment of their Lordships was delivered by

LORD DAVEY. In the case of *Quinlan* v. *Child* the proposed appellant has already obtained leave to appeal from the Court of Appeal for the Windward Islands, and his application is that he, having obtained leave in regular form, may prosecute that appeal in formâ pauperis. Their Lordships will advise Her Majesty that that order should be granted.

In the case of *Quinlan* v. *Quinlan* their Lordships will advise Her Majesty to give leave to appeal against the order or decree of July 20, 1899, in the separation suit, against the order or decree of December 21, 1899, in the mortgage suit, and against the order of February 7, 1900, directing the decree of December 21, 1899, to be put in execution.

If it stood on the order or decree in the separation case alone their Lordships would have felt some difficulty on the statements in the petition in advising Her Majesty to grant special leave to appeal; but with regard to the mortgage suit their

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Lordships are disposed to think that there is something which requires further inquiry and which would justify them in advising Her Majesty to grant leave to appeal from the decree in that suit.

The two suits, the separation suit and the mortgage suit, are so mixed up together that if there is to be an appeal in the mortgage suit it seems to their Lordships better that they should have the whole case before them and adjudicate (if the appeal ever comes before them) on the whole matter.

In advising Her Majesty to grant leave to appeal their Lordships ought to say that they are influenced by the fact of there being apparently no power of appeal to the Court of Appeal for the Windward Islands in formâ pauperis. That appears to be so from s. 934 of the Civil Procedure Code, which provides that with his notice of appeal the appellant must give the names and addresses of the sureties "for the purpose hereinafter mentioned," which seems inconsistent with any application to appeal in formâ pauperis.

With regard to that part of the prayer of the petition which asks their Lordships to stay the sale advertised for May 26 pending the appeal, their Lordships have no jurisdiction to make an order for that purpose, but probably the petitioner may be advised, and if so advised will take steps by notice to the parties conducting that sale which will prevent the sale having any adverse influence upon any decree or order which Her Majesty may ultimately make when the appeal for which leave is given is heard.

Their Lordships do not propose to report to Her Majesty that it is necessary to make it part of the order on this petition that it is to be without prejudice to any application by the respondent to rescind the order, which is made ex parte, but they warn the petitioner that he must be prepared to meet any such motion if the respondent should be advised to present a petition for that purpose. The leave, of course, will be to sue in formâ pauperis.

Solicitors for petitioner: *Hutchinson & Cuff.*

[PRIVY COUNCIL.]

WILLIAMS . . . . . PLAINTIFF;

AND

SCOTT . . . . . DEFENDANT.

J. C.*
1900
May 17;
June 19.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Vendor and Purchaser—Title of Trustee for Sale who has purchased for himself—Effect of Beneficiaries consenting—Effect of Intermediate Sale to a Third Party.

In an action by a purchaser of land against a vendor for rescission of contract:—

Held, that the title disclosed being that of a purchaser from himself as trustee for sale, it was inequitable to force it upon the plaintiff.

A defence that, notwithstanding the form of the transaction, the defendant really derived title from the beneficiaries who assented to the transaction with full knowledge of all the circumstances must be proved by clear affirmative evidence to that effect.

A further defence that there had been an intermediate sale to a third person and a purchase by the trustee from him will not avail unless that sale were a completed one.

A trustee cannot adopt for his own benefit an executory contract to purchase to which he is a party as vendor: *Parker* v. *McKenna*, (1874) L. R. 10 Ch. 96.

APPEAL from a decree of the Supreme Court (May 25, 1899) reversing a decree of the Chief Judge in Equity (March 3, 1899) and ordering specific performance of an agreement made December 2, 1898, for the sale by the respondent as mortgagor to the appellant of certain land at Camperdown, near Sydney.

The question decided was whether the mortgagor's title was a good and marketable one, he having derived it by purchase from himself as trustee for sale.

The facts are fully stated in the judgment of their Lordships.

Warrington, Q.C., and *W. B. Lindley*, for the appellant, contended that specific performance ought not to have been decreed. The respondent had failed to make out a good title.

* *Present:* LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, SIR HENRY DE VILLIERS, and SIR FORD NORTH.

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Her mortgagor was a trustee for sale who had bought from himself. That sale was liable to be set aside at the suit of any one interested in the proceeds of such sale. With a title so invalid, or at the very least so doubtful, it was inequitable to force it on the appellant.

Swinfen Eady, *Q.C.*, and *E. Morten*, for the respondent, contended that the sale was to John Austin in the first instance, and not to David, the trustee. The arrangement under which the name of the latter was substituted in the conveyance was well known to all the beneficiaries interested in the sale proceeds, and was approved of and acquiesced in by them. Before the conveyance was executed by David, the beneficiaries had received the price agreed to be paid by John. John's contract has never been attacked or impeached in any way, and it was made openly and in good faith.

Counsel for the appellant were not heard in reply.

1900
June 19.

The judgment of their Lordships was delivered by

SIR FORD NORTH. On December 2, 1898, the respondent, a mortgagee with power of sale, agreed to sell to the appellant a piece of land at Sydney, in New South Wales, for 550*l*. The purchaser paid a deposit of 25 per cent., or 137*l*. 10*s*. So far as regards the title, the contract was an open one.

The title disclosed by the abstract, so far as material, was as follows: By her will dated April 12, 1887, Mrs. Catherine Austin appointed her son David Austin, and her daughter Catherine Neilan, her trustees and executors, and devised the property in question and other property to them upon trust to sell the same; and, after payment of her debts, funeral and testamentary expenses, and the costs of sale, to divide the residue of the proceeds among her eight children named in her will.

Catherine Austin died in 1888, and by a deed dated June 28, 1889, and made between the said David Austin and Catherine Neilan, described as trustees and executors of Catherine Austin, of the first part, William Neilan (the husband of Catherine Neilan) of the second part, the said David Austin, as administrator de bonis non of the deceased husband of Catherine

Austin, of the third part, Sydney John Bull of the fourth part, and the said David Austin as purchaser of the fifth part; after reciting (inter alia) the will and death of Catherine Austin, and that the said David Austin and Catherine Neilan had contracted with the same David Austin for the sale to him as purchaser of the land in question, it was witnessed that, in consideration of 550*l.* paid by the purchaser to the trustees, the parties of the first three parts conveyed the property by the purchaser's direction to S. J. Bull to such uses as the purchaser should by deed or will appoint, and in default of appointment to the use of the purchaser in fee. By a receipt indorsed upon that deed, it appears that on the day of its date the trustees received the whole purchase-money of 550*l.* from David Austin.

The abstract also shewed that by deed dated September 30, 1897, David Austin mortgaged the property to the respondent for 500*l.*

The purchaser's solicitors objected to the title upon the ground that David Austin was incapable of purchasing from himself and his co-trustee, and that the title, therefore, was not a marketable one. The vendor's solicitors insisted that the title was good, and produced a copy of what they described as an absolute release to the trustees from all the beneficiaries under the will of Catherine Austin, such release being dated June 15, 1889. The purchaser's solicitors pointed out that the release was insufficient, as it did not shew that the beneficiaries were aware, or knew the effect, of the transaction in question; to which the vendor's solicitors replied that the transaction was well known to and acquiesced in by all the beneficiaries, and that in fact it was because the sale was made in the form set out in the conveyance of June 28, 1889, that the release of June 15 was executed. The purchaser's solicitors still insisting on a deed of confirmation, the vendor's solicitors wrote on January 9 that they declined to procure such a deed, as they did not consider it necessary, not suggesting, however, that there could be any difficulty in procuring the execution of such a deed by all parties. In the same letter the vendor's solicitors also wrote: "Since writing you previously we have discovered that the sale was not made to David Austin, but to John

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Austin, who was not a trustee, but was one of the beneficiaries under the will of Catherine Austin. We have obtained a copy of the contract for sale, which may be inspected here. We send herewith a copy of the advertisement. This property was put up for sale by Messrs. Richardson & Wrench on the 16th November, 1888, and was knocked down to John Austin for the sum of 550*l.*, subject to Messrs. Richardson & Wrench's usual printed conditions. Subsequently to the date of the contract John Austin agreed with David Austin that the latter should take the land purchased by John Austin, and relieve him of the contract. This was done, and the land was conveyed to Mr. S. J. Bull as trustee for David Austin. The property was not therefore purchased by D. Austin from the trustees, but from John Austin."

This disclosure did not induce the purchaser's advisers to dispense with confirmation by the beneficiaries; and as such confirmation was refused they claimed to have the deposit returned, saying, however, that they were willing purchasers, and if their objections were met in a fair way within the next week or ten days their client would still be prepared to purchase the land; to which the only reply of the vendors' solicitors was, on January 16, that they had answered all the requisitions, and that, under a power in the contract, the vendor would re-sell unless the purchase was completed during the week, and hold the purchaser liable for any loss on such re-sale. They did accordingly advertise the property for sale; but this was stayed by an injunction in the present suit, commenced by the purchaser against the vendor for rescission of the contract, upon the ground that the vendor had failed to make out a good title to the property, and for a return of the deposit and other consequential relief.

On March 3, 1899, the suit came on to be heard before the Chief Judge in Equity, who agreed, by the wish of both parties, to decide the one point as to the title raised by the requisition above quoted, and to leave it open to either party to ask for a reference to the master as to the title on all other points. On the same day he made a decree, declaring that the defendant had failed to make out a good title to the land and

that the contract must be rescinded; directing that the deposit should be repaid to the purchaser with interest, and that the plaintiff's costs of the suit should be paid by the defendant; declaring that the plaintiff was entitled to a lien on the defendant's interest in the land for such deposit and interest; and restraining the defendant from dealing with the land to the prejudice of that lien.

The vendor—the defendant in the action and present respondent—appealed from that decree, and the appeal was heard before Sir Frederick Matthew Darley C.J. and Owen and Walker JJ. The two former agreed that the title was one which could be forced upon a purchaser, and that the decision of the Court below was wrong. The latter was of opinion that the appeal should be dismissed.

Their decree was dated May 25, 1899, and declared, in effect, that the decree of March 3 should be reversed, and that the agreement of December 2, 1898, ought to be specifically performed and carried into execution in case a good title could be made to the land in question, and directed inquiries as to the title. It also directed that the costs of that appeal should be paid by the plaintiff (the present appellant) to the defendant, and that the other costs of the suit should be reserved until further consideration.

It is clear undisputed law that a trustee for the sale of property cannot himself be the purchaser of it—no person can at the same time fill the two opposite characters of vendor and purchaser. But the purchase by David Austin is attempted to be supported upon two grounds not quite consistent with one another, namely, first, that he was the purchaser of the property from all the beneficiaries, who agreed in the sale to him with full knowledge of all the circumstances; and, secondly, that he and his co-trustee sold the property to John Austin, one of the beneficiaries, who, not being a trustee, was under no incapacity to purchase, and that David Austin subsequently purchased it from John Austin.

As regards the first point, their Lordships are unable to agree with the view taken by the majority of the Full Court. No sufficient evidence is forthcoming that any of the bene-

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ficiaries knew of the circumstances under which David Austin acquired and took the conveyance of the property. The only document relied upon is the release already mentioned; but this is not specifically directed to the defect in question, and is quite insufficient for the purpose of curing it. It is unskilfully framed and inaccurate, and, instead of being precise, is extremely vague and general. It is impossible to treat this release as finally bringing the trust to an end; the property now in question still remained vested in the trustees, and the purchase-money remained unpaid. Although the release states that the property had been sold, the fact that the sale had been to David Austin, a trustee for sale, and was therefore impeachable as not being a sale at all, is not disclosed; and the explanation that this release of June 15 was executed because of the form of the conveyance executed thirteen days afterwards is not intelligible. The accounts referred to in the release, which would probably have thrown some light upon the matter, are not produced. The only other evidence bearing upon this point is the affidavit of Mr. White, who appears to have been in 1889 an articled clerk of Mr. Bull, the solicitor of the trustees of Catherine Austin, and who is now a member of the firm acting as the vendor's solicitors. He says in the 3rd paragraph of his affidavit that all the beneficiaries under the will knew that the land was purchased by John Austin, acquiesced in the sale, and ultimately received the purchase-money and executed the release. It is remarkable that in the letters written by this gentleman's firm as the vendor's solicitors the knowledge asserted and the acquiescence relied upon are knowledge of and acquiescence in a sale not to John Austin at all, but to David Austin the trustee, a totally different matter, the alleged sale to John Austin not having been discovered till a later period. Moreover, a general statement that persons knew and acquiesced is in itself of little weight: it is a statement not of facts but of results, a mere allegation by one party of the condition of mind of others. It may be that the deponent's statement that the parties knew and acquiesced is merely an inference drawn by him from the fact that they have not taken any steps to reopen the matter. To give such

a statement any value as evidence it should also shew what knowledge of the material facts the parties had, and how they had obtained such knowledge, and by what acts of theirs their acquiescence was shewn; but this is wholly wanting. It is difficult to understand, on the perusal of Mr. White's affidavit, what are the "foregoing facts" which he says he knows of his own knowledge. It cannot be that he refers to all that has previously been stated. This would make different parts of the affidavit inconsistent with one another, and would treat the deponent as swearing to facts irreconcilable with existing documents. This affidavit of the defendant's solicitor is not supported by any other evidence. David Austin, the trustee who has been ever since 1888 in possession of and is now residing upon the property, and has mortgaged it to the vendor, and who must know all the facts, is not called as a witness, nor is Mrs. Neilan, the other trustee, nor are any of the beneficiaries to whom knowledge and acquiescence are imputed, and no reason is given for their absence. Under these circumstances it is clear that, if David Austin did himself purchase from the trustees, as stated in the conveyance of June 28, there is not before their Lordships any evidence of such acquiescence with full knowledge on the part of the beneficiaries as would prevent them from now coming forward to challenge the validity of the sale. They are not parties to this action, or bound by any of the proceedings in it.

The other point relied upon is, that the sale by the trustees was really made not to David Austin, the trustee, but to John Austin, one of the beneficiaries, who was not a trustee, and was, therefore, capable of being the purchaser. This is absolutely inconsistent with the terms of the conveyance itself, which recites that the contract was by the trustees with David Austin, and shews that the whole purchase-money was paid by him. The abstract of title was made out upon the footing that David Austin, and not John Austin, was the purchaser from the trustees, and the title is not traced through John Austin at all. The alleged sale to John Austin was apparently not even known to Mr. White until after the abstract had been delivered. He does, in his affidavit, state that on November 16,

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1888, this property was sold by auction by Messrs. Richardson & Wrench to John Austin for 550*l.*, and puts in a copy of the contract then entered into. Where this document comes from is not stated, nor is there any proof that it is a correct copy nor is the absence of the original accounted for. It purports to be a copy of the conditions of sale at the auction, and to bear at its foot the signatures "J. Austin" and "Richardson & Wrench, for vendor." The original with John Austin's signature would in ordinary course have remained in the possession of Messrs. Richardson & Wrench, the vendors' agents; but, although an affidavit is made by a Mr. Gregg (who describes himself as one of the managing directors of Richardson & Wrench, Limited), which states that the land was sold to John Austin, the highest bidder, for 550*l.*, he does not state that he was concerned in the matter, or was a member of or in the employ of that firm in 1889, nor discloses his means of information upon the subject, or refers to either original or copy of any contract bearing John Austin's signature. Neither Mr. Gregg's evidence, nor the copy contract put in by Mr. White, refers to any deposit having been paid by John Austin; and this bears out the statement on the conveyance that the whole 550*l.* was paid by D. Austin on June 28. Mr. White states in his affidavit that John Austin purchased this land bonâ fide for his own use, and paid a deposit on account of the same; that he subsequently agreed to sell it to David Austin, and it was arranged that, instead of the land being conveyed to John Austin, and by him to D. Austin, it should be conveyed direct to Mr. S. J. Bull, as trustee for D. Austin. It is not stated when or how or by whom this alleged arrangement was made, or how Mr. White was informed of it. If the arrangement had been such as he states, John Austin should have been joined as a party to the conveyance, which should have recited the contract by the trustees to sell to John, and the contract by John to sell to David; and the conveyance by the trustees to David, or to Mr. Bull, should have been under John's direction. Although John was not a party to this deed, he was a party to and executed the release of June 15, in which he is described as "of Sydney, freeholder."

If the conveyance had been thus framed the truth would have been fairly stated, whatever else might be said about the transaction. Upon what conceivable ground can it be supposed that the parties should have ignored the real facts, and have invented a false account of the transaction, and that, too, one which introduced a palpable blot upon the face of the title? Here, also, evidence is absent which might have been available if the transaction had been such as is suggested. But D. Austin and Mrs. Neilan, the trustees, are silent. Mr. S. J. Bull, the solicitor of the trustees, who, as trustee for David Austin himself, was a party to the conveyance of June 28, and is at present practising as a solicitor at Sydney, is silent also. John Austin makes no affidavit, but it does not appear what has become of him.

It may be that the true account of the transaction is that suggested in the letter of January 9, 1899, namely, that after John Austin had contracted to buy, he desired to get rid of his purchase, and David Austin agreed to take the land off John's hands, and stand in his place, and relieve him of his contract. This might account for the form of the conveyance. But this, it will be observed, is quite a different thing from an affirmance of John's contract to purchase, and a subsequent resale by John as owner to David, the state of facts to which Mr. White deposes. If these were the true facts, the transaction would be invalid upon a different ground, namely, that so long as the contract with John was executory only, and John had neither paid his purchase-money nor taken up his conveyance, and the trustees who were vendors had power either to enforce or rescind or alter the contract, it was not competent for David Austin to step into John Austin's place, or take over John Austin's contract for his own benefit: see *Parker* v. *McKenna*. (1) In any case the result would be the same.

It was strongly contended by the purchaser's counsel that Mr. White's statements must be accepted as unchallenged, because no attempt was made to shake them by cross-examination. This is a point deserving serious consideration. But

(1) L. R. 10 Ch. 96.

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Mr. White's evidence is by no means satisfactory as it stands. The proposition seems to have found some favour in the Full Court, that if the documents are capable of an innocent interpretation in favour of the title, and the Court can say that the parties have not infringed any principle of law and were not guilty of misconduct, it will rather put that interpretation upon it than assume that the parties had been guilty of some wrongdoing, or breach of law; and that in the absence of evidence to the contrary the Court must assume that the release was a proper one, and that the cestui que trusts were informed of all necessary matters. Their Lordships are unable to agree in this view. The conveyance itself is incapable of any interpretation but one, and that is unfavourable to the title. A trustee for sale of trust property cannot sell to himself. If, notwithstanding the form of the conveyance, the trustee (or any person claiming under him) seeks to justify the transaction as being really a purchase from the cestui que trusts, it is important to remember upon whom the onus of proof falls. It ought not to be assumed, in the absence of evidence to the contrary, that the transaction was a proper one, and that the cestui que trusts were informed of all necessary matters. The burthen of proof that the transaction was a righteous one rests upon the trustee, who is bound to produce clear affirmative proof that the parties were at arm's length; that the cestui que trusts had the fullest information upon all material facts; and that, having this information, they agreed to and adopted what was done. Their Lordships cannot accept the affidavit of Mr. White as sufficient proof of these matters, especially when other independent evidence which might have been given is not forthcoming.

Under these circumstances, it would be inequitable to force such a title as this upon the appellant. It is not merely that the purchaser would be running the risk of proceedings being taken by the cestui que trusts to reopen the transaction. The purchaser would be saddled with a property which he would be unable for many years to put upon the market, unless recourse was had to some special restrictive condition which might seriously reduce the price a purchaser would be willing to pay for it.

Their Lordships will humbly advise Her Majesty to discharge the order of the Full Court, and dismiss with costs the appeal to that Court; and to direct that the respondent repay to the appellant the costs which by the decree of the Full Court the appellant was ordered to pay to the respondent. Their Lordships direct the respondent to pay to the appellant her costs of this appeal.

Solicitors for appellant: *Young, Jones & Co.*
Solicitors for respondent: *Clapham, Fitch & Co.*

[HOUSE OF LORDS.]

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THE ASSESSMENT COMMITTEE OF CAMBERWELL . . . . . } APPELLANTS;

AND

ELLIS . . . . . RESPONDENT.

Metropolis—Rate—Quinquennial Valuation—Supplemental Valuation List—Provisional Valuation List—Alteration in Value of Hereditament—Cause of Alteration—Onus of Proof—Valuation (Metropolis) Act 1869 *c.* 67 *ss.* 43, 46, 47.

To justify an alteration of the quinquennial valuation of a hereditament by a supplemental or provisional valuation list under the Valuation (Metropolis) Act 1869 ss. 46, 47, those who seek to alter the assessment must not only prove that there has been an alteration in the annual value of the hereditament, but must also prove the nature and cause of that alteration and that the cause is one which directly affects the assessable value of that particular hereditament. It is not enough, for instance, to shew merely that since the quinquennial valuation there has been throughout the metropolis a general rise in the annual value of the class of property to which the hereditament in question belongs, and that the annual value of that hereditament has increased accordingly.

The decision of the Court of Appeal, [1900] 1 Q. B. 68, affirmed.

ELLIS the respondent had been since October 1896 the occupier of a public-house known as the Adam and Eve, High Street, Peckham, in the parish of Camberwell. At the quinquennial valuation in 1895 the gross and rateable values of the public-house were fixed at 485*l.* and 405*l.* respectively, which values were duly entered in the quinquennial valuation list made in that year. By a provisional list made in December 1896 the assessment was increased by the overseers to 600*l.* gross and 500*l.* rateable value, and objection was made by the occupier on the ground that the public-house had not in the course of the year in which the provisional list was made increased in value by the addition thereto or erection thereon of any building, nor had there been any increase of value from any cause within the meaning of s. 47 of the Valuation (Metropolis) Act 1869. At the hearing of the objection the assessment committee endeavoured to get from the occupier

information as to the premium given by him for the lease of the public-house. This information he refused to give, and the assessment committee after hearing the objection and viewing the public-house reduced the assessment objected to to 575*l.* gross and 485*l.* rateable value.

In the supplemental valuation list made in 1897 the public-house was again valued and assessed at 575*l.* gross and 485*l.* rateable. The occupier objected to the valuation and on appearing before the assessment committee contended, inter alia, (1.) that the public-house had been improperly included in the provisional list, and therefore ought not to be included in the supplemental list and was therein too highly rated; (2.) that no alteration in the value of the public-house had taken place during the twelve months preceding the making of the supplemental valuation list within the meaning of s. 46 sub-s. 1 of the Valuation (Metropolis) Act 1869; (3.) that the overseers were not in law entitled to consider or in any way to act on any sum of money paid or supposed to have been paid for the public-house either since the date of the valuation list in force at the time of the making of the provisional list or at all. The assessment committee after hearing the objections refused to grant the occupier any relief, and he appealed to the London Quarter Sessions.

At the hearing of the appeal counsel for the occupier again objected to any questions being asked, or any evidence being given, about the premium paid by the occupier. The Court, however, overruled the objection, and the fact was elicited on cross-examination that the occupier had paid 16,400*l.* as the consideration for his lease. No evidence was given as to the precise amount of the premium paid in 1895 or any time previously, but it was admitted by one of the occupier's witnesses that, assuming the valuation appearing in the quinquennial list made in 1895 to have been calculated according to the method usually adopted in the parish of Camberwell, the valuation must have been based on a supposed payment of a premium of about 6400*l.* The assessment committee, however, at the time of the revision of the quinquennial valuation list did not in fact know the precise amount of the premium which

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had been paid by the then occupier. Evidence was given by a valuer on behalf of the assessment committee that there had been, since the date of the quinquennial valuation list, a general appreciation of licensed premises throughout the metropolis, and that in his opinion the annual value of the public-house had between April and October 1896 increased by about 100*l*. It was, however, admitted that there had been no structural alteration to the public-house. No evidence was given of any circumstances specially affecting the annual value of the public-house. The assessment committee contended that they were not bound to give any such evidence, but that it was enough for them to shew that the value had in fact increased. It was further admitted that no public-houses had been placed in the provisional or supplemental lists except such as had in fact been sold since the date of the quinquennial valuation thereof although public-houses in the neighbourhood had generally increased in value.

For the assessment committee it was contended that it was not necessary that there should be a structural alteration of the rated premises in order to warrant their insertion in a supplemental list, that the facts before mentioned as to the premium given for the lease of the public-house were evidence of an alteration in matters stated in the quinquennial valuation list during the twelve months preceding the making of the supplemental list within s. 46 of the Valuation (Metropolis) Act 1869, and that the payment of such premium shewed that there had been such a material and unforeseen alteration of the value of the public-house as to warrant its insertion in the supplemental list.

For the occupier it was contended that the facts before mentioned were not in law any evidence of an alteration within the meaning of s. 46 sub-s. 1 of the Valuation (Metropolis) Act 1869, and that all evidence as to the amount of premium paid by the occupier for the public-house in October 1896 was irrelevant and inadmissible, and that the amount of such premium in the absence of any evidence, save as hereinbefore stated, as to the premiums previously paid could not afford any indication of an alteration in the value of the public-house.

The court of quarter sessions gave judgment in the following terms: "We find that although there has been no structural alteration in the premises between April 1896 and April 1897, there has been alteration in value in the premises by way of increase in that period. The occupier has failed to establish in our opinion that the alteration in gross and rateable values made by the assessment committee in the supplementary list is in excess of the actual increased value within the statutory period, and we confirm the alteration of the list made by the assessment committee with costs." The values in the supplemental list were therefore ordered to remain as assessed by the assessment committee, and the appeal was dismissed subject to the opinion of the Queen's Bench Division upon a special case containing the above facts.

The questions for the opinion of the Court were: (1.) Whether the alteration in value which took place during the twelve months preceding the making of the supplemental valuation list was in law an alteration within the meaning of s. 46 sub-s. 1 of the Valuation (Metropolis) Act 1869; (2.) Whether the amount of premium paid by the occupier in October 1896 for the premises ought to have been received in evidence; (3.) Whether the amount of such premium was in law any evidence of an alteration within the meaning of the sub-section before mentioned. If the Court should answer all the foregoing questions in the affirmative, then the order of sessions was to be affirmed, and if the Court should answer all or any of the questions in the negative then either the order of sessions was to be quashed and the gross and rateable values of the public-house were to be reduced to 485*l.* and 405*l.* respectively, or the premises struck out of the supplemental valuation list, or the Court was to make such further or other order as to the Court should seem fit.

The Queen's Bench Division (Lawrance and Channell JJ.) affirmed the order of quarter sessions. The Court of Appeal (Lord Russell of Killowen C.J., A. L. Smith and Vaughan Williams L.JJ.) reversed the decision of the quarter sessions and of the Queen's Bench Division, and ordered that judgment be entered at the quarter sessions for the occupier that the

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hereditaments be struck out of the supplemental valuation list with costs. (1) The assessment committee brought the present appeal.

July 10, 12. *Balfour Browne Q.C.* and *Macmorran Q.C.* (*Ryde* with them) for the appellants. The case stated by quarter sessions finds as a fact that there has been an "alteration in value in the premises by way of increase" in the twelve months preceding the making of the supplemental list. That finding of fact is conclusive if there was any evidence to support it, and the opinion of the expert valuer and the payment of a large premium constitute evidence to support the finding. The fact being thus found it is immaterial whether the case is considered under s. 46 sub-s. 1 of the Valuation (Metropolis) Act 1869 which provides for the making of a supplemental list where there has been an "alteration in any of the matters stated in the" quinquennial valuation list, or under s. 47 which provides for the making of a provisional list "if in the course of any year the value of any hereditament is increased by the addition thereto or the erection thereon of any building, or is from any cause increased or reduced in value." Clearly the alteration is not confined to structural additions or alterations; nor to causes ejusdem generis: *Reg.* v. *St. Mary, Islington, Assessment Committee.* (2) The words "from any cause" are amply wide enough to include a rise in value owing to a rise in the annual values of licensed houses throughout the metropolis. The Court of Appeal would have held that this was a sufficient cause if they had not been misled by the idea that it was necessary to negative a rise in the values of hereditaments of all classes. There are no words in the Act to justify such a conclusion, but if there were the case should have been sent back to quarter sessions to ascertain whether there had been such a general rise in values. All that need be found as a fact is that there has been an increase in value in the particular hereditament. It is immaterial whether that is due to general causes or to particular causes: to causes affecting only the hereditament in question, or affecting only

(1) [1900] 1 Q. B. 68. (2) (1887) 19 Q. B. D. 529.

that class of property, or affecting every class: to an improvement in the building, in the street, in the district or in the community generally. The object of the Act was to secure uniformity of assessment and provide for interim alterations. It is not going behind the quinquennial valuation to shew that in consequence of the unusual prosperity of a trade, premises devoted to that trade have increased in value and ought to be placed in a supplemental list. If s. 47 is confined to additions or structural alterations and causes ejusdem generis, then Cockburn C.J. in *Reg.* v. *New River Co.* (1) was wrong. In that case the growth of population was held to justify a supplemental list for the mains and pipes of the company. Whatever the cause, whether improvement in a particular trade, or, as Vaughan Williams L.J. put it, "the general prosperity of the country," if in fact the hereditament is shewn to have been enhanced in value, it may be placed in the supplemental list. *Reg.* v. *Poplar Union Assessment Committee* (the East and West Indian Docks Case) (2) and *Reg.* v. *St. Mary, Islington, Assessment Committee* (the Agricultural Hall Case) (3) were instances in which depreciation and diminution of profit were held to be just grounds for a supplemental list and reduced assessment. The principle contended for was affirmed in this House in *Cartwright* v. *Sculcoates Union* (4), in which *Dodds* v. *South Shields Union* (5) was discussed. It is not necessary here to decide the case of a general appreciation, or one affecting a whole locality, although, even in such cases, it might well be contended that there could be a supplemental list, as the valuation is adopted for the purpose of the Queen's taxes. It is enough to shew that the particular hereditament has during the year increased in value.

Littler Q.C., *Page Q.C.* and *W. Russell* for the respondent were not heard.

EARL OF HALSBURY L.C. My Lords, in this case I am of opinion that the judgment of the Court of Appeal is right.

(1) (1879) 4 Q. B. D. 309.
(2) (1884) 13 Q. B. D. 364.
(3) 19 Q. B. D. 529.
(4) [1900] A. C. 150.
(5) [1895] 2 Q. B. 133.

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The questions which are propounded to your Lordships seem to me to get rid of some of the difficulties which would arise if one were to give a theoretical opinion upon what the whole effect of the statute is, because the questions which are reserved for your Lordships are questions of law, as indeed they properly ought to be. With questions of fact your Lordships have nothing to do. Indeed, if the quarter sessions had simply found that this public-house had increased in value from any cause, although they did not specify what the cause was, and not reserved these questions of law for us, I do not suppose that there would have been any process by which, if it were wrong, that finding could have been set right. Dealing with it as a question of fact, the sessions would have been perfectly independent of any other tribunal; and if they had found as a fact that there was an alteration of value within the meaning of the statute, and that that amounted to an additional 100*l.* a year, there would have been no power to alter that judgment and set it right.

But the sessions have in this case, as they should have done, asked your Lordships questions on the facts that came before them. The first question they ask is this: "Whether the alteration in value which took place during the twelve months preceding the making of the said supplemental valuation list was in law an alteration within the meaning of s. 46 sub-s. 1 of the Valuation (Metropolis) Act 1869." Now, "the alteration in value which took place" assumes that there was an alteration and that there was an alteration in value. That evades the real question which it is intended to ask by putting it in a compendious form. But when the sessions have reserved that upon the case submitted to us, it appears to me there was no evidence whatever which would have justified them in saying that there was any alteration within the meaning of the statute, even if as a matter of fact the value of the house was greater in the one year than it was in the other.

The Legislature by the Act of 1869, for very obvious reasons, wishing to have a uniform assessment in the metropolis, and not wishing that from time to time these same questions should, at great expense to the parish and at great vexation to

the ratepayers, be reopened year after year, determined that for a period of five years the assessment, once made, should continue in force, and that it should not be competent to raise again the question which would be very properly and appropriately raised at the period of assessment. That is the meaning of the Assessment Act. It having once been ascertained what the value is, the statute proceeds to point out exceptional and peculiar difficulties which might arise if it was unalterable altogether, and it proceeds to say that if there is any alteration in value in one particular hereditament, and that hereditament is either increased in value by the addition or erection of any building (and then they add the words) "or from any cause," the proposition that the assessment is to last for five years is not to be so inflexible as to prevent, upon a proved alteration in the value either from a structural alteration or any other cause whatever, an inquiry into that circumstance. The words which follow the provision as to structural alterations are very wide words indeed, and it is very intelligible that the statute should not have attempted to define the circumstances under which such an alteration should be properly inquired into. But still, if you give the construction to them which some words occasionally used by a learned judge might be supposed to give them, namely, that you shall not inquire into any alteration in value unless the value is altered, what would be the meaning of the statute altogether? Unless there is some circumstance beyond the mere fact of alteration in value to give rise to the inquiry, the statute has done nothing, because in every case where the overseers said, "Oh, this has been assessed at too low a value, and I want it assessed at a higher value"—in every case, without reference to any alteration of circumstances, the mere alteration of that which was put down as the value would justify a fresh inquiry. That, of course, would be an extremely absurd proposition, because the statute would enact with one hand a power which it took away with the other; and one cannot suppose that the statute would be so foolishly conceived. It would be disrespectful to the Legislature to suggest that it had, really, elaborately enacted nothing. On the other hand, to lay down as a rule a

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broad proposition which should embrace every case would be extremely dangerous, even if it were not, as I think it would be, impossible. Each case must depend upon itself, and in dealing with this particular matter I protest that I am not laying down any other general principle than this: that I think there must be something beyond the mere suggestion of the valuer that the house is worth more than it is assessed at. If there is nothing more than that, it seems to me there is nothing upon which a Court ought to act—because that would be, in effect, to repeal the statute.

Therefore, my Lords, I say, in answer to the first question, that as a matter of law the mere giving of evidence that the house is worth more than it was assessed at at the quinquennial valuation is not evidence of an "alteration" in law which ought to be received.

Now, it is remarkable to observe that, giving the narrowest interpretation to those words, there is no evidence in this case at all of what was the supposed value at the period of the quinquennial valuation. The reason for that is obvious enough, because that valuation is conclusive on the parties—conclusive, that is to say, in any attempt to say that it was wrong; that is absolutely the valuation which has been arrived at. But I should have thought that, even if the mere alteration in value was the thing relied upon, the evidence ought to have been somewhat of this character: "Such and such was the value of the house at that date; the value of the house now is a great deal more, and therefore I have proved an alteration in the value of this public-house." I do not say that that would have been sufficient, but it would have given some colour to the argument; but here there is absolutely nothing. The gentleman who is called as an expert witness is called to say, "I had a premium paid when this man entered." That might be evidence; I think the second question must be answered in the affirmative, that it is evidence, but although it is evidence it comes to nothing unless you establish a comparison between the two periods and shew that you have got an enhanced premium given; but nothing of that sort is suggested. I decline to go into the curious ratiocination by which it was

suggested that there must have been a less premium given before than was given then, because it seems to me to be rather reducing it to an absurdity. I say that there was no evidence at all of comparison, and it is only if there is a comparison that this is relevant or useful evidence. Of course, the fact of what was given by way of premium is evidence, and the sessions were right in receiving it; but what I point out is that, unless there is a term of comparison, although it is admissible evidence it comes to nothing.

The third question is, "Whether the amount of such premium was in law any evidence of an alteration within the meaning of the sub-section?" By itself it is no evidence in law of anything. It may be it shews what is the value of the public-house at that moment. I do not mean to say that it is not relevant evidence to shew what is the value of the public-house, but as a term of comparison, when you have nothing to compare it with, it establishes nothing whatever as a matter of law.

Under those circumstances, my Lords, it appears to me there was no evidence at all upon which any tribunal would be entitled to come to the conclusion that there was an alteration of circumstances such as I think was pointed out by Cockburn C.J. as giving rise to the permissibility of a fresh inquiry as to the value of the house.

My Lords, I have said that I agree that the judgment of the Court of Appeal is right; but I hesitate very much to adopt all the reasoning of Vaughan Williams L.J., because, although there are some illustrations which his Lordship gave with which I concur, yet where he deals with the question of increased trade in the cycle industry, or such general propositions as that a war might affect the value of premises licensed for the purpose of carrying on the manufacture of gunpowder, and so on, I hesitate very much to say that those are circumstances which could be properly referred to, looking at the statute, which contemplates an alteration of circumstances in respect of the particular hereditament that is to be rated. That is the guiding line; and although I agree that the opening of a bridge, the opening of a new street—all these things which have

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relation to the particular hereditament to be rated—might be properly applicable and properly considered in relation to an alteration of circumstances to allow the hereditament to be valued again; when we are dealing here with the alteration contemplated by the statute it appears to me that the topics referred to by the learned judge are too wide and too much outside the particular hereditament in respect of which the inquiry is to be held to be properly applied and considered for the purpose of establishing the proposition sought to be proved.

My Lords, under these circumstances I move your Lordships that this appeal be dismissed with costs. I will only say that in giving judgment in this case I am simply endeavouring to give judgment upon these facts alone. I lay down no general proposition of law beyond this—that the statute has to be construed in each case and applied to the circumstances of each case. It appears to me that anything more dangerous, even if it were possible, than to lay down exactly where you are to draw the line it would be difficult to conceive. I therefore say that I think this judgment of the Court of Appeal is right in this case for the reasons I have given, and I move your Lordships to affirm it accordingly.

LORD SHAND. My Lords, I have come, after listening to the very able argument which has been addressed to us, to the same conclusion with your Lordships that this appeal ought to be dismissed. It appears to me that the argument maintained by the learned counsel for the appellants is substantially contradictory to the principle of quinquennial valuation. The statute undoubtedly lays down the rule that there is to be a quinquennial valuation, and that it is only in the case of alterations in the value, which I think must be clear and rested on grounds which the statute will admit of, that there is to be an alteration afterwards made in the valuation during one of the years of the current period of five years. It is required that the alteration must be proved. In that case the first clause of s. 47 comes into operation, and that is really what has to be construed in the present case: "If in the course of any year the value of any hereditament is increased by the addition

thereto or the erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect." If you are to read those words "is from any cause increased or reduced in value" in the wide sense which is contended for by the appellants, it appears to me that you would have no longer a quinquennial valuation—it would come to be substantially an annual valuation by the mere proof that the value of the subject had from some cause or other (I do not care what it may be) either appreciated or depreciated. My Lords, I do not think that can be the sound reading of the statute. The cases have perhaps gone rather far in that direction. I am of opinion that it must be something analogous—not necessarily closely analogous, but still analogous—to the case that is there put of "the addition thereto or the erection thereon of any building," or for some similar cause such as would affect the appreciation or depreciation of the particular building with which you are dealing. In this case the evidence alleged, as affecting apparently the mind of one witness only, of a large premium paid in the year before this attempted revaluation took place, really, so far as that goes, drops out of the case. It was a scrap of evidence suggesting that a large premium meant an increase in value, but, without a comparison with some other standard such as the premium paid in the previous year and the grounds on which each premium was fixed, it is of no value.

The case, therefore, now before the House rests entirely on the statement contained in the special case, which is to this effect—that "Evidence was given by a valuer on behalf of the respondents that there had been since the date of the quinquennial valuation list a general appreciation of licensed premises throughout the metropolis, and that in his opinion the annual value of the said public-house had between April and October 1896 increased by about 100*l*." But it is added: "It was however admitted that there had been no structural alteration to the said public-house. No evidence was given of any circumstances specially affecting the annual value of the said public-house. The respondents contended that they were not bound to give any such evidence, but that it was enough

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for them to shew that the value had in fact increased." As I have already said, if it is enough for them to shew only what is here stated, you destroy the quinquennial valuation and substitute for it an annual valuation, which is against the principle of the statute.

My Lords, it appears to me to be clear that if "alteration" is alleged to have occurred either in the way of depreciation or in the way of appreciation, the onus is upon the person making the statement to prove it. Some circumstance, I think, specially affecting the particular subject must be shewn—as, for instance, as has been put by his Lordship on the Woolsack, the building of a bridge which has greatly increased the traffic and produced large profits in comparison with what had been obtained before from in some respects really a new locality; or the addition, as has been suggested by my noble and learned friend, Lord Davey, of a large factory in the neighbourhood which has brought in a large amount of custom to the particular house or the particular place; or, to take another illustration, the addition of pleasure-grounds to the particular house which, although there has been no additional building, has brought much increased profits to the occupier of the house. In all those cases there has been an increased value plainly arising from circumstances affecting the particular house. In the same way the value may be depreciated by the shutting up of a road, or by the erecting of a new house next door in competition, or by some other special circumstance of the kind. I think it must be taken generally that in each case some circumstances analogous to those I have now put must be proved to have caused either appreciation or depreciation. In this particular case nothing of the kind has been shewn, but there has simply been evidence that the value has risen.

My Lords, I am not prepared to form a final judgment upon the cases which have been put by the Court of Appeal—the case of a taste for cycling causing a rise in value in the whole of the cycle factories and their profits, or a rise in the price of gunpowder causing a rise in all premises where gunpowder is manufactured. I doubt very much whether such circumstances would warrant any change of valuation; but it is not necessary

to express a final opinion on that question at present. In this case I am clearly of opinion that there are no circumstances proved or stated specially affecting the property in question which can entitle the assessor to raise the value during the currency of what I may call the quinquennial period.

LORD DAVEY. My Lords, I am of the same opinion. The first thing, of course, that we have to do is to construe s. 47: "If in the course of any year the value of any hereditament is increased by the addition thereto or the erection thereon of any building or is from any cause increased or reduced in value," then the provisions which follow in the section apply. My Lords, I agree with the learned judges in the Queen's Bench Division that those words cannot be confined to structural alteration or addition or anything of that kind, but I think that the words "from any cause" are to be read as ejusdem generis in this sense—that it must be a cause which affects the value of the particular property. The point is very well put in the judgment of Vaughan Williams L.J., that it lies upon those who desire to alter the assessment to prove the nature and cause of the alteration in value. It is not sufficient to say that there has been an alteration in value, but you must also point to some definable cause to which that alteration is due, and that cause must be one which affects the assessable value of the particular property. It may affect the assessable value of other properties as well, but it must in my opinion be a cause which directly affects the assessable value of the particular hereditament in question.

My Lords, I should have come to that conclusion on the construction of this particular section alone, but I agree with my noble and learned friend on the Woolsack, that if you look at the scope and object of the Act it is made even more plain. The object of the Act was that a valuation should be made once every five years which should be conclusive and binding for a period of five years in order to prevent the annoyance, trouble, and expense of a fresh assessment every year, and the inconvenience to people whose property is assessed. Now, my Lords, if it were sufficient to shew that there has been a

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general increase in value in order to obtain a new assessment, it appears to me, as it does to my noble and learned friend, that you would to a very large extent be nullifying the provisions of the statute and depriving the statute of much of the beneficial results which it was expected to have.

My Lords, a great deal has been said as to what should be the character of the "cause": I think it is safer to confine myself to saying that it should be one, to use the language I have already used, which directly affects the value of the property itself. Various illustrations have been put and many others might be put. I think it wiser to follow the course taken in the Act itself, of not too exactly defining what the alteration of circumstances must be that will give rise to the right to a fresh assessment. I will merely say this, that I should hesitate before I acceded as a general principle to some of the illustrations which were given in the judgment of the Court of Appeal. It is not necessary that I should express my concurrence with everything which was said in the Court of Appeal, but I entirely agree in the conclusions at which the learned judges have arrived; and I do say this, that a mere alteration in value is not sufficient for the purpose. What I understand to have been found is that there has been an alteration in the value of these premises by way of increase in the period between April 1896 and October 1896, but that that alteration is due to a general increase in the value of public-house property in the metropolis. I do not think that is sufficient, and therefore I should answer the first question by saying that the alteration in value which was found to have taken place afforded no evidence which would support an alteration of the valuation list. I should answer the second question by saying that the amount of premium is no doubt evidence, but that the amount of the premium received is not in itself evidence which would justify an alteration in the valuation list. I therefore concur in the judgment proposed.

LORD ROBERTSON. My Lords, I entirely agree in all that has been said by my noble and learned friends. The general scheme of the Act is that the valuation is to stand for five

years, irrespective of fluctuations of general value which may occur during that period. But the Legislature also deals with the case of individual hereditaments, the value of which happens to have been altered, not by general economic or social change, but by change in their own individual conditions affecting value. In the present instance nothing appears in the case to shew anything special or individual in the cause of the alleged enhancement of the value of this house, so as to bring the case within the scope of the sections founded on.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 12, 1900.

Solicitors: *Marsden & Son; Maitlands, Peckham & Co.*

[HOUSE OF LORDS.]

WEIR, FOR HIMSELF AND OTHERS, OWNERS OF THE SS. "ELLERIC" } APPELLANT;

AND

THE UNION STEAMSHIP COMPANY, LIMITED . . . . . } RESPONDENTS.

Ship—Charterparty—Construction—Responsibility for Navigation—Obligation of Shipowner to supply Ballast.

By a charterparty a ship was let to the charterers for their sole use and benefit for the conveyance of merchandise $\frac{\text{and}}{\text{or}}$ passengers with liberty to sub-let (subject to owner's approval of trade) for two or three round voyages at charterers' option, to be placed by a certain day "with clear holds" at the disposal of the charterers, they "having the whole reach or burthen of the vessel," proper and sufficient room being reserved to the owners for the officers, crew, tackle, &c.; the owners undertaking to maintain her in a thoroughly efficient state during the currency of the charter; the captain to use every reasonable despatch in prosecuting the voyages, and (though appointed by the owners) to be under the orders and directions of the charterers as regards employment, agency

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and other arrangements; the freight for the hire of the ship to be paid monthly until she was returned by the charterers to the owners:—

Held, that upon the true construction of the whole of the charterparty (without deciding whether the contract more nearly resembled one of demise than of carriage) the responsibility for the navigation of the ship was imposed upon the owners, and that the owners were therefore liable to provide any ballast that might be necessary for safe navigation.

The decision of the Court of Appeal, [1900] 1 Q. B. 28, affirmed.

THIS appeal turned, in the words of Vaughan Williams L.J., upon the doubtful construction of a private document, a charterparty of an involved character. The material clauses of the charterparty made June 10, 1897, between the appellants, owners of the SS. *Elleric*, and the respondents, charterers, were as follows:—

1. The said vessel or steamer being tight, staunch and strong, and in every way fitted for the service, and to be maintained by owners, with sufficient complement of officers, seamen, engineers, firemen, and stewards, shall be placed at the disposal of the said charterers, or their assigns, to be employed by them in the conveyance of lawful merchandise (including live stock) $\frac{\text{and}}{\text{or}}$ passengers, as follows: Between all good and safe ports and places (inter alia) in the United States $\frac{\text{and}}{\text{or}}$ ports of South and East Africa. 2. The said vessel is let for the sole use of the said charterers, and for their benefit, and with liberty to sub-let (subject to owners' approval of trade) for two or three round voyages at charterers' option, commencing not later than the 15th day of July next, by which day she is to be placed, with clear holds, at the disposal of the charterers, at the port of New York, they having the whole reach or burthen of the vessel, including passenger accommodation, if any, proper and sufficient room being reserved to the owners for the officers, crew, tackle, apparel, furniture, provisions, and stores; and the vessel is not to be required to load more than she can reasonably stow and carry over and above her tackle, provisions, stores, and fuel. The owners guarantee that vessel has just been in dry dock and painted, and undertake to maintain her in a thoroughly efficient state during the currency of her charter. Hire is not to commence before July 10, unless charterers otherwise agree. Grain from States between October and

April to be limited to net register tonnage of steamer. 3. The captain shall use all and every reasonable despatch in prosecuting the voyage or voyages, sails are to be set whenever practicable and of advantage to charterers, and the crew are to render all customary assistance in loading and discharging, which, however, is to be carried out by and at the risk and expense of the charterers, they employing the necessary stevedores for the purpose, but owners are to provide all necessary gear and men to work the steam-winches in ports of loading and discharge. Crew's overtime, if any, to be paid by charterers. 4. The captain (although appointed by the owners) shall be under the orders and directions of the charterers as regards employment, agency, and other arrangements, and the charterers hereby agree to indemnify the owners against all consequences or liabilities that may arise from the captain signing bills of lading or in otherwise complying with such orders and directions. 5. If the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and if necessary make a change in the appointments. 6. The captain shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct log of the voyage or voyages, which are to be patent to charterers or their agents. The captain shall also see that his officers keep proper cargo tallies. 7. The coals for the steam-engines shall be supplied by and at the cost of the charterers, who shall also bear all port and dock charges, pilotage, light dues, agency commissions, delivery, labourage, and all other duties, charges, and expenses, the owners providing and paying for all other ship's stores, insurance, crew's wages, and victualling, and necessary stores for the engine-room, and all stores, bedding, crockery, mess utensils, and other requirements for passengers. Charterers to pay 5*s.* per day for victualling any passengers carried first-class; 2*s.* 6*d.* per day for second-class; and 1*s.* 6*d.* per day for third-class, and to provide any fittings required for second and third class passengers beyond those on board, always provided there is room for the passengers. 8. The

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freight for the hire of the said vessel shall be paid as follows, at and after the rate of: 1050*l.* per month, but should the vessel be kept on hire over twelve months, all extra time to be paid for at the rate of 1150*l.*, and to be paid monthly in cash in advance in London, and to continue payable, notwithstanding expiration of time specified for terminating the charter, until the vessel is again returned by the charterers to the owners at New York, to be delivered in like good condition as when chartered, fair wear and tear excepted. In the event of loss of time by deficiency of men, want of stores, breakdown of engines or machinery, or by damage causing the vessel, for more than twenty-four running hours, to become incapable of steaming, less efficient, less tight, staunch and strong, or less fitted for the service than at the date of this charterparty, payment of hire to cease until such time as she is again in an efficient state to resume her voyage. In the event of the vessel being lost, hire to cease from date on which she was last heard of, and any payments or advances in respect of time subsequent thereto or during inefficiency as above to be refunded the charterers.

The owners guaranteed a certain dead weight and measurement capacity and that the steamer's speed was 9–10 knots on a consumption of about 20–22 tons Welsh coal.

The other clauses are set out in the report below. (1)

The ship was required by the charterers to proceed from New York to South Africa, with a cargo which the charterers loaded, and she made this voyage three times. On the return voyages from South Africa to New York the charterers required her to proceed without any cargo. The water ballast carried in the ship's tanks being in the captain's opinion insufficient for safety, he requested the charterers to supply other ballast. On the first return voyage no other ballast was supplied and the ship suffered damage. On the second and third return voyages the captain refused to proceed without further ballast, and the charterers under protest supplied sand ballast, and deducted the cost from the hire.

The appellants having brought an action for damages and

(1) [1900] 1 Q. B. 28.

the deducted hire against the respondents, by consent an order was made for a preliminary trial without a jury of the question, whose duty it was under the charter to provide any ballast beyond water ballast that might be necessary for the safe sailing of the ship on the chartered voyages and at whose expense. Bigham J. tried the question and entered judgment for the defendants. This decision was affirmed by the Court of Appeal (A. L. Smith and Collins L.JJ., Vaughan Williams L.J. dubitante). (1)

July 19, 20. *Carver Q.C.* and *Leck* for the appellant. The Courts below went on the principle that the shipowner must provide whatever is necessary to make his ship fit for a voyage, including ballast. That would be so if this were a contract of carriage, but it is not. It is a demise of the ship with complete disposal in the charterer except as to navigation. By the terms of the contract the charterer is to have full liberty to load, and is subject to the corresponding duty of so adjusting the cargo as to make navigation possible. There was no warranty on the owner's part, but there was on that of the charterers. The owner merely lets the vessel; he had no right, if he had been so disposed, to put in ballast. The case resembles *Trinity House* v. *Clark* (2), where a ship was chartered to the Commissioners of Transport Service for the Crown and it was held that there was a temporary ownership in the Crown. There as here the charterer was at liberty either to load with a cargo or not. It was in the nature of a demise, the thing demised including the master and a complement of men. The terms of the charterparty (see particularly clauses 2–8) rebut the usual presumption of the owner's responsibility for safe navigation. The term "labourage" in the 7th clause is decisive of the charterer's liability as it is a comprehensive term including all forms of work on the ship. *Towse* v. *Henderson* (3) was a wholly different case.

Joseph Walton Q.C. and *Scrutton* for the respondents. No principle of law is involved: the case turns entirely on the

(1) [1900] 1 Q. B. 28. (2) (1815) 4 M. & S. 288.
(3) (1850) 4 Ex. 890; 19 L. J. (Ex.) 163.

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construction of a loosely-drawn charterparty. It matters not whether the contract be one of demise or carriage: the question is what have the parties said or implied as to the responsibility for navigating the vessel. There is nothing in this charterparty which releases the shipowner from his ordinary liability to ensure safe navigation, and clauses 2–8 clearly express or imply the liability. He is responsible not only to the charterers but to shippers. It may be that the vessel is "let" to the charterers, but that word and the word "sub-let" have been used in cases in which there has been no demise. The law was laid down in this sense in *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (1) in this House. The master's first duty is to the owner, who in his turn is responsible to others. Here, too, the speed is guaranteed, and that enforces the liability of the owner to keep the vessel in proper trim, for which ballast is required. This is in accordance with settled principles. Other cases turning upon different provisions are of little use, but those to whom precedents are essential may be referred to *Manchester Trust* v. *Furness* (2), *Towse* v. *Henderson* (3), and *Omoa and Cleland Coal and Iron Co.* v. *Huntley*. (4) The word "labourage" must have a more restricted meaning than that contended for. It cannot include all the work which may have to be done on the ship: e.g. if the propeller is injured the owner is liable for the repair.

Carver Q.C. in reply. The cases cited contra differ from the present case, in that there was an obligation on the charterers to load a full cargo. There are no words of that kind here, and the owners' responsibility is confined to maintaining the ship as an efficient machine. "Labourage" includes all shore labour, and therefore the supply of ballast.

The House took time for consideration.

July 23. LORD DAVEY. My Lords, the appellants are the owners of a steamship called the *Elleric*, and the respondents were the charterers of that vessel from the appellants under a

(1) [1893] A. C. 8.
(2) [1895] 2 Q. B. 539.
(3) 4 Ex. 890; 19 L. J. (Ex.) 163.
(4) (1877) 2 C. P. D. 464.

charterparty dated June 10, 1897. The only question raised on the appeal is whether on settling the accounts between the parties the appellants (the owners) ought to be charged with all the expenses of ballasting the vessel with sand in addition to the water ballast which was found necessary on a voyage from South Africa to New York. Was it the duty of the shipowner to provide the ballast? or was that a duty which in this case was undertaken by the charterers? The answer to this question must depend on the true construction of the charterparty.

The usual form of charterparty is a contract by which the use of the vessel is placed at the disposal of the charterers, but possession remains in the owners who navigate the vessel by their own officers and crew. It is not and cannot be denied that in such a contract the shipowner is bound to provide the necessary ballast for his ship, the reason being, as Smith L.J. put it, that, as he is responsible for the navigation of the ship by his captain, he is responsible for the ballast necessary to enable his ship to perform the contemplated voyage.

But of course this primâ facie obligation may be rebutted by the express words of the instrument. Mr. Carver's first argument was that the charterparty in the present case was not of the character I have described, namely, a contract of carriage, but amounted to a demise of the ship, and he argued that a provision that the master and crew should be the servants of the owner was not inconsistent with that construction, and in support of this argument he cited the case of *Trinity House* v. *Clark*. (1) That case was decided on very special circumstances, and can hardly be a precedent for any other. But, my Lords, I cannot entertain any doubt that this contract is one by which the right, duty, and responsibility of navigating the vessel is in the owners. In this respect the case is hardly distinguishable from that of *Omoa and Cleland Coal and Iron Co.* v. *Huntley* (2); and if this point be determined in favour of the appellants, the question whether the contract otherwise more nearly resembles one of demise than one of carriage becomes academic. It is clear

(1) 4 M. & S. 288. (2) 2 C. P. D. 464.

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that this contract is not one in which the ship is completely handed over to the charterers to be navigated by them at their own risk and responsibility. Primâ facie, therefore, the obligation of providing the ballast is on the appellants.

[His Lordship then read the second clause of the charter-party.] Mr. Carver contended that the obligation to place the vessel "with clear holds" at the disposal of the charterers was inconsistent with the existence of any right or power to place ballast in her. My Lords, I am not of that opinion. I think you must read this clause with the other stipulations of the contract, and if you find that the owners are responsible for the safe navigation of the ship they must have the right and the power to do whatever may be necessary to enable them to discharge that responsibility. In other words, you must read such expressions as "with clear holds" or "the whole reach or burthen of the vessel" as meaning the full space of the vessel proper to be filled with cargo; and on this question I think *Towse* v. *Henderson* (1) is in point. Before parting with the 2nd clause, I observe that the charterers are not obliged to ship a full cargo or any cargo, and it was therefore within the contemplation of the parties that the vessel might have to sail in ballast.

I will not pause on clause 3, which provides that "loading and discharging" is to be carried out by and at the risk and expense of the charterers, because I am clearly of opinion that that provision applies to cargo only.

Reliance was also placed on clause 4, which is in these terms: "The captain (although appointed by the owners) shall be under the orders and directions of the charterers as regards employment, agency, and other arrangements"—not, your Lordships will observe, as regards navigation—"and the charterers hereby agree to indemnify the owners against all consequences or liabilities that may arise from the captain signing bills of lading or otherwise complying with such orders and directions." The argument was that the necessity for ballast was the direct consequence of the charterers' orders as to the vessel's employment, and, therefore, a matter in respect of which the owners

(1) 4 Ex. 890.

were entitled to indemnity. My Lords, the argument is ingenious, but the answer appears to me to be that the clause has nothing whatever to do with navigation or any incident of navigation, and was not, in my opinion, intended to shift the responsibility for the safe navigation of the vessel from the shoulders on which it is placed by other terms of the contract.

The only other clause relied on was clause 7. [His Lordship read the material parts.] It was said, first, that all expenses of every description other than those expressly undertaken by the owners are imposed on the charterers, and also that "labourage" would include the labour of loading and unloading the ballast. But, my Lords, it is obvious that many expenses relating to the ship and labour employed about her would not be included in these words: for example, expenses connected with maintenance of the ship in an efficient state; and, if so, why should expenses necessarily incurred for the purpose of her safe navigation be included? The duties of maintenance and navigation are by the 8th clause of the contract put on the same footing in this respect—that the payment of hire is to cease as well from any accident of navigation as from any default in maintaining the vessel in a state of efficiency.

My Lords, I have dealt with these minor points out of respect to the learned counsel who argued the case of the appellants. But the broad and sufficient ground for decision is that the providing proper ballast for the stability of the vessel is incident to her safe navigation, the responsibility for which is by the contract imposed on the appellants.

My Lords, I am of opinion that the judgments of Bigham J. and the Court of Appeal are quite right and ought to be affirmed, and I move your Lordships accordingly.

LORD BRAMPTON. My Lords, the only substantial question in this case appears to me to be whether the charterparty under consideration ought to be construed as a contract for the hire and letting by the owners to the charterers of the ship itself in its integrity, so as to transfer for the time being to the charterers the control over her working and navigation,

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and making them practically the owners of her during the voyages contemplated by the charterparty, or as a contract conferring upon the charterers a right to insist upon the ship being used and employed to the extent of her carrying power, exclusively on their behalf and for their sole benefit according to the terms agreed on, the ship itself subject to such right remaining for all purposes of navigation and maintenance under the control of the officers and servants of the owners, and on their behalf. Bigham J. and the Court of Appeal held the latter to be the true construction of the contract. I am of opinion that those judgments are right.

I am far from saying that some of the phrases employed in the charterparty do not give colour to the argument for the appellants: for instance, the stipulations in clause 1—that the vessel shall be placed at the disposal of the charterers; in clause 2—that the vessel is let for the sole use of the charterers and with liberty to sub-let; and in clause 8—that the freight for the hire of the vessel shall be paid at so much per month until the vessel is again returned by the charterers to the owners at New York, in like good condition as when chartered. But none of them necessarily indicate that it was the intention either of the owners to transfer to the charterers, or of the charterers to accept the absolute possession of the ship, during the currency of the charter; while there are stipulations throughout the charterparty which, to my mind, indicate a contrary intention. Clause 1 provided that the vessel should be maintained *by the owners* with sufficient complement of officers, seamen, engineers, firemen, and stewards; and although by clause 2 the charterers were to have the disposal of the whole reach or burthen of the vessel, proper and sufficient room was reserved to the owners for the officers, crew, tackle, apparel, furniture, provisions, and stores; and further, in the same clause the owners undertook to maintain the vessel in a thoroughly efficient state during the currency of her charter. These clauses, coupled with clauses 3, 4, 5, and 6, indicate to my mind that it was the intention of both owners and charterers that the captain, with his officers and crew, were to remain in actual possession of the vessel as the

servants of the owners for the purposes of her maintenance and proper navigation throughout all the voyages contemplated by the charter, but for such purposes only. In all other respects the carrying capacity of the vessel was at the disposal of the charterers, whose orders and directions as to the voyages were to be obeyed.

The case of *Trinity House* v. *Clark* (1) turned very much upon the character of the service for which the vessel in that case was chartered, and I do not regard it as any authority against the contention of the respondents. The case of *Omoa and Cleland Coal and Iron Co.* v. *Huntley* (2) is an authority for holding that in this case the vessel, for the purposes of navigation, remained in the possession and under the control of the owners.

The *Elleric*, the subject of the contract, was duly placed at the disposal of the charterers at New York on the day named with clear holds, as stipulated. It will be observed, however, that the charterparty imposed no obligations upon the charterers to load a full, or indeed any, cargo on board; but the holds were clear to enable them to do as they pleased in that respect; and they did in fact load a cargo, which was duly discharged at South African ports. The respondents then directed the captain to take the vessel back to New York without any cargo, as it is conceded they had a perfect right to do. The captain, however, very truly pointed out that the water-ballast tanks with which the vessel was fitted were not sufficient to enable her to proceed safely on such a voyage without cargo or extra ballast, which he requested the respondents to furnish. This they refused to do; and the *Elleric* made the voyage without it, but sustained damage in so doing. On the second and third voyages the captain was also requested to take the vessel from a South African port to New York without any cargo or such extra ballast; but he refused to do so. Thereupon the respondents supplied the ballast required under protest, and when they came to make payment to the appellants for the hire of the vessel they

(1) 4 M. & S. 288. (2) 2 C. P. D. 464.

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deducted the expenses of so doing. It must be conceded that such ballast was absolutely necessary for the safety of the vessel.

Taking the facts as I have stated them, and construing the contract as I think it ought to be construed, I do not think it is open to question that, in the absence of express stipulation to the contrary, the owners would be responsible for the expenses of the requisite ballast so supplied: *Moorsom* v. *Page* (1); *Irving* v. *Clegg*. (2) I fail to find in the charter-party anything which exonerates the owners from the duty of supplying all ballast necessary for the safe navigation of the ship on the voyages for which she was chartered. The requirement that she shall be placed with *clear holds* at the disposal of the charterers before the commencement of any voyage meant, in my opinion, no more than this—that the charterers were to have the holds clear to enable them to stow in them such cargo as the ship could reasonably carry. They might stow in and fill them with a cargo of such bulk and weight as to make further ballast, beyond the water ballast, altogether unnecessary. On the other hand, they might think fit to load so light a cargo as that, without more ballast, the ship would be unsafe for her voyage. Can it be seriously doubted that in such a state of things the captain would be justified in requiring—nay, more, that it would be his duty to require—space to be reserved for him to put into the hold on behalf of his owners such ballast as was necessary properly to trim the ship and make her fit for her voyage? Let me suppose for a moment that the charterers at starting had determined to send the ship out from New York to South Africa without any cargo (as they did from South Africa to New York): could it be said that, the holds being then clear, the captain would not have been at liberty, and that it would not have been his duty towards his owners, to put in them such ballast as he deemed necessary for the safety of their ship—of course, at their expense?

I have read most carefully clause 7—so much relied on for

(1) (1814) 4 Camp. 103. (2) (1834) 1 Bing. N. C. 53.

the appellants—but I fail to see any obligation imposed on the charterers to provide anything essential for the navigation of the ship. No such obligation is conveyed in the word "labourage," and it seems to me to be impossible that in the use of the words "other duties, charges, and expenses" the parties meant, or had it in contemplation, to include ballast if necessary. If it had been their intention to shift on to the shoulders of the charterers the ordinary obligation of the owner under such a contract, I should have expected to find express words to that effect. As the result of the best consideration I can apply in this case, I am of opinion that this appeal should be dismissed with costs.

LORD ROBERTSON. My Lords, I cannot say that I have any doubt of the soundness of the decision appealed against.

The appellants have relied on the peculiar terms of the charterparty, and of those I shall presently speak. But the general rule is admittedly that in an ordinary contract of affreightment the owner is liable for ballast. Now, why is this? It is because the function of ballast is, as Tindal C.J. says, to make the ship trim for her voyage. It is put in, therefore, to fit the ship safely to carry the particular cargo placed on her. One ship will require more ballast and another less, and it is for the master to judge whether any and what ballast his ship will require during a proposed voyage, and having regard to the nature of the proposed cargo. The expense of ballast is therefore on the owner, because it is an incident of the duty of navigating the ship.

It seems to me, therefore, that in every case the key to the question who pays for ballast is found in the answer to the question with whom is the duty of navigating. Now, although there has been some discussion as to whether there is under this contract a demise of the ship, there can be no question that the duty of navigation is with the owners. This being so, it seems to me that all the controversy as to whether there is not here at the same time a demise of the ship is immaterial and theoretical. But I say this, not in order to suggest any doubt of the soundness of the view expressed on this point

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in the Court of Appeal, but rather to indicate that primâ facie the criterion of such disputes is to be found in what is uncontroverted.

Now, it has been argued that certain provisions of the charter-party imply that the charterers undertake the duty of ballasting. The appellants attach much importance to the fact that clause 2 places the ship at the disposal of the charterers "with clear holds." The phrase is striking; but I do not think that it stands the strain of the appellants' argument. If there is anything in the argument it proves too much, for it would equally shew that, whoever paid for it, the putting in ballast at all would be a breach of the contract, as depriving the respondents of part of the stipulated cargo space. In truth, however, the words "with clear holds" must be read along with the sequel of the clause, and the words "and the vessel is not to be required to load more than she can reasonably stow and carry" shew that the whole is subject to the effective fulfilment by the owners of the duty of safe navigation. To that extent the "clear holds" mean holds with ballast in if and when required; and no light is obtained from those words as to who is to pay for the ballast.

Nor would any repugnancy to clause 2 arise if it be allowed that the well-settled rule would apply that the owners might carry freight-earning ballast. For ballast is never anything but the complement of the proposed cargo; and the owner can never claim to put in ballast so as to oust cargo which would itself make the ship trim. It is only when the cargo is announced that the question of ballast arises.

Clause 7 is the only other which seemed to give a foothold for Mr. Carver's argument, and he relied mainly on the word "labourage." Now, at the best, this word is insufficient to cover the whole of the claim now in dispute, for the price of the ballast is one part of the claim. But, apart from this, the very general word "labourage" may well be satisfied by labour required in any of the incidents or contingencies which may occur in port. I do not find in clause 7, or in any other part of the charterparty, any implication, much less any provision, sufficiently clear to transfer to the

charterers a liability which in its nature falls on the owners as navigating the ship.

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Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 23, 1900.

Solicitors: *Lowless & Co.; Bircham & Co.*

[HOUSE OF LORDS.]

WALTER AND ANOTHER (ON BEHALF OF THEMSELVES AND ALL OTHER THE PROPRIETORS OF THE BUSINESS OF PUBLISHING AND CARRYING ON *THE TIMES* NEWSPAPER) . . . . . APPELLANTS;

AND

LANE . . . . . RESPONDENT.

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Copyright—Newspaper—Reports of Public Speeches—"Author" of Report—Copyright Act 1842 *c.* 45 *ss.* 2, 3, 18.

A person who makes notes of a speech delivered in public, transcribes them, and publishes in a newspaper a verbatim report of the speech, is the "author" of the report within the meaning of the Copyright Act 1842, is entitled to the copyright in the report and can assign the copyright.

So held by the Earl of Halsbury L.C. and Lords Davey, James of Hereford, and Brampton, Lord Robertson dissenting.

The decision of the Court of Appeal, [1899] 2 Ch. 749, reversed, the decision of North J. restored and the injunction made perpetual.

ON five occasions in 1896 and 1898 the Earl of Rosebery delivered to public audiences speeches on subjects of public interest. Reporters attended on behalf of *The Times* and other newspapers. The reporters for *The Times* took down the speeches in shorthand, wrote out their notes, corrected, revised and punctuated their reports for publication, and the reports were published in *The Times*, the speeches being given verbatim as delivered by Lord Rosebery. With the speeches were

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published articles describing the meetings, and reports of the utterances of some other speakers. The reporters were employed under the terms that the copyright in all reports and articles composed by them for *The Times* should belong to the proprietors. In 1899 the respondent published a book called "Appreciations and Addresses: Lord Rosebery." It consisted of reports of the above speeches of Lord Rosebery, the speeches being preceded by short notes explaining the occasion. It was admitted that these reports were taken (substantially verbatim) from the reports in *The Times*. The proofs of the respondent's book were said to have been corrected by comparing them with an album containing Lord Rosebery's speeches kept and revised by himself. The album contained *The Times* reports of four of the speeches in question, and those reports had not been altered in the album. Lord Rosebery made no claim. *The Times* reporters having formally assigned the copyright in the articles and reports to the appellants, the appellants brought an action against the respondent claiming a declaration that the copyright of the articles and reports was vested in the proprietors of *The Times*, and also an injunction, damages and costs. North J. granted an injunction restraining the respondent until judgment in the action from publishing &c. copies of the book "Appreciations and Addresses: Lord Rosebery," or other copies of the reports of the speeches in *The Times*, or any substantial portions thereof. In the Court of Appeal the parties agreed that the appeal should be treated as the trial of the action.

The Court (Lindley M.R., Sir F. Jeune, and Romer L.J.) reversed the decision of North J. and dismissed the action with costs. (1)

The Times appealed.

July 20, 23. *Joseph Walton Q.C.* and *MacSwinney* (*H. Terrell Q.C.* with them) for the appellants. By the Copyright Act 1842 s. 2 "book" means (inter alia) "every sheet of letterpress separately published," and therefore includes *The Times* newspaper. This will not be denied: the contest is whether

(1) [1899] 2 Ch. 749.

the reporter is the "author" of part of a "book" within the Act, and is entitled to the copyright in it. By s. 2 "the word 'copyright' shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied." Sect. 3 introduces the word "author," enacting that the copyright in every book published in the lifetime of its "author" shall endure for the natural life of such "author" and for seven years after his death, and shall be the property of such "author" and his assigns &c. By s. 18, if the proprietor of any periodical work or any book employs any persons to "compose" the same or any parts thereof for publication on the terms that the copyright therein shall belong to such proprietor, the copyright in every part so "composed" and paid for shall be the property of such proprietor, who shall enjoy the same rights as if he were the actual "author" thereof &c. Who is the "author" of the report of a speech within the Act? Clearly the reporter. The speaker has a common law right of property in the speech before it is delivered to the public and may prevent its publication by any one else: *Caird* v. *Sime* (1); but Lord Rosebery (as the Lord President said in that case) "abandoned his ideas and words to the use of the public at large, or in other words has himself published them." That decision was as to a lecture delivered to a university class: whether the speaker of a speech delivered to the public and obviously intended for newspaper publication has any control over the publication is a different question. Lord Rosebery at all events makes no claim to copyright in the speech or in any report of it. The Court of Appeal confuses authorship of the speech with authorship of the report. Lord Rosebery is the author of the speech but certainly not of the report. There is nothing in the Act to imply that a reporter may not be an author; s. 3 implies that one who "composes," i.e., puts together, a report or any other article for a newspaper is or may be the author. Literary skill or originality are not necessary to authorship: protection has been given to the composer of a directory: *Kelly* v. *Morris* (2), of a

(1) (1887) 12 App. Cas. 326, 344. (2) (1866) L. R. 1 Eq. 697.

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sheet of advertisements: *Lamb* v. *Evans* (1), and other publications where there was no literary skill or originality, nothing but industrious collection. There is at least as much intellectual work, taste and skill in a report of a speech as in those compilations: a good report requires a wide knowledge of history and literature. Reproduction is an art in itself, whether by words, pictures, photographs or sculpture. Grimm's Fairy Tales are said to have been taken down by the Brothers Grimm from the mouths of peasants. Was there no copyright there? It is a great hardship if protection is not given to reports of speeches which can only be produced by the expenditure of much time, money and toil.

Birrell Q.C. and *Scrutton* for the respondent. There is no hardship in the decision that a verbatim report cannot be protected by copyright. The newspaper proprietor and the reporter are amply protected by the immediate sale and reputation of the paper. But hardship has no bearing on the question, which is simply what does the Copyright Act mean? Does it mean that the word "author" shall be extended to persons who have never yet been regarded as authors? It is not a question of literary taste and skill, of good or bad literature, but of original composition. This there may be in a condensed report, and a reporter may so alter, rewrite and compose a speech as to be in truth the author of the speech he reports. But the present is a case of verbatim reports where the very words of the speaker are faithfully, exactly reproduced. Even the mistakes are reproduced: e.g., in Lord Rosebery's quotation from the witch scene in Macbeth, "When the battle's lost *or* won," *The Times* faithfully reproduced the "or": the respondent corrected it in his book to "and." No matter what the learning, literary lore and skill may be which are required to produce such a report, it is not an original composition; not a composition at all within the meaning of the Act. The printer's compositor may be, often is, and in old times still oftener was, most learned, but he does not "compose" the book within the meaning of the Act. The

(1) [1893] 1 Ch. 218.

verbatim reporter, however learned, artistic, and accomplished acts simply as the echo, the mocking bird, the slave of the speaker. He who writes from dictation is not "the only begetter" of the words, not the author of the thoughts and expressions, which alone give value to the report. To be an author one must think the thoughts, and choose the words and the order of them. A reporter does neither. Copyright has never been allowed in cases where no independent labour has existed. The making of a Golden Treasury, even of a directory, a red book, a map or plan &c., involves orderly arrangement, classification, choice, rejection, construction. These are not required for a verbatim report. To obtain the protection of copyright there must be in substance a new and original work: *Dickens* v. *Lee* (1); *Jarrold* v. *Houlston*. (2) In the Oxford English Dictionary an "author" is defined as "the person who originates or gives existence to anything:" "an inventor, constructor, or founder;" "the composer or writer of a treatise or book." The Copyright Act does not define "author," but in a literary statute the Legislature should have the credit of being supposed to use words in a literary not a commercial sense. The preamble says "Whereas it is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world." This contemplates authors, not reporters. The Act carried on the tradition of the earlier statutes which were passed "for the encouragement of learning." Production not reproduction is what is meant to be protected. "Copyright" is defined as the sole and *exclusive* liberty of multiplying copies. How can there be exclusive liberty in two or more separate and independent authors of the same book? Yet it is said that each person who produces a verbatim report has the copyright in his own report. How can that be when the reports are identical? If the verbatim reporter is the author, who is the author when a speech is spoken into a phonograph, reproduced out of it and printed? Is the phonograph itself the author? or is the inventor of the phonograph? And who is entitled to the copyright? Which is the more

(1) (1844) 8 Jur. 183. (2) (1857) 3 K. & J. 708.

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meritorious, the more worthy of protection—the fallible man, or the unerring machine? The cases of pictures and photographs are not analogous or convincing. The subject or the view may be the same, but the pictures or photographs may be entirely different, coloured and formed by the different qualities of the respective artists. Each artist may well be entitled to the copyright in his own picture, photograph or sculpture. They are not identical as verbatim reports are. The appellants' argument must and does go this length, that they are entitled to restrain all the world, including the speaker, from printing copies of the speeches. True, Lord Rosebery might have protected himself under 5 & 6 Will. 4 c. 65, or by asserting his own proprietary right. But he did not. What great speaker does? Lord Rosebery having delivered his speeches to the world as he did without any restriction, copyright in them or in reports of them cannot be acquired by any one else. That delivery amounted to a publication; just as a representation of a dramatic work is a publication: *Boucicault* v. *Chatterton.* (1) If the appellants are right the result is a satire upon this attempt of the Legislature to protect authorship. It has been said that there is copyright in legal judgments. The better opinion seems to be that there is only copyright in the headnotes of law reports, but this again must depend on how much original composition and labour is introduced into the statement of the facts, the arguments of counsel, and even the judgments. See *Butterworth* v. *Robinson* (2): *Sweet* v. *Maugham* (3); *Sweet* v. *Benning.* (4)

[Reference was also made to *Macklin* v. *Richardson* ("Love à la Mode") (5), *Nottage* v. *Jackson* (6), *Chilton* v. *Progress Printing and Publishing Co.* (7), and to the cases cited in the Courts below. (8)]

MacSwinney in reply.

The House took time for consideration.

(1) (1876) 5 Ch. D. 267.
(2) (1801) 5 Ves. 709.
(3) (1840) 11 Sim. 51.
(4) (1855) 16 C. B. 459.
(5) (1770) Amb. 694.
(6) (1883) 11 Q. B. D. 627.
(7) [1895] 2 Ch. 29.
(8) [1899] 2 Ch. 749.

Aug. 6. EARL OF HALSBURY L.C. My Lords, I should very much regret it if I were compelled to come to the conclusion that the state of the law permitted one man to make profit and to appropriate to himself the labour, skill, and capital of another. And it is not denied that in this case the defendant seeks to appropriate to himself what has been produced by the skill, labour, and capital of others. In the view I take of this case I think the law is strong enough to restrain what to my mind would be a grievous injustice. The law which I think restrains it is to be found in the Copyright Act, and that Act confers what it calls copyright—which means the right to multiply copies—which it confers on the author of books first published in this country.

That the publications in question, namely, reports of Lord Rosebery's speeches, are simply copies of what was first printed in *The Times* newspaper is not denied. And further, it has not been and cannot be denied that they were originally, as in *The Times*, a sheet or sheets of letterpress, and came within the definition of the Act as a book. The speeches, therefore, and the sheets of letterpress in which they were contained, were books first published in this country; and I confess upon looking at the definition and the right conferred I am wholly unable to discover why they are not protected by the statute from being pirated by unauthorized persons.

The sole ground, as I understand the judgment of the Court of Appeal, is, that in their judgment the producer of a written speech unless he is the original speaker cannot be an "author" within the meaning of the Act. My Lords, it seems to me that this argument is based upon a too narrow and misleading use of the word "author." In my view the statute has not meant so to confine it, and I do not understand the explanation the Court of Appeal gives of the application of the word "author" to such publications as directories, red books, maps, &c.

I observe the Court of Appeal uses the word "analogy" as applicable to such questions. To my mind it is no analogy at all. If the maker of a directory, red book, or a map is an "author," one has to analyze what in such cases is the distinction between the "author" as thus referred to and the

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author of a spoken speech. The language of the Court of Appeal is: "Each man who himself makes a directory, &c., and publishes it, is the author of what he publishes. The reporter of a speech is not." With great respect to the Court of Appeal, this is allegation, not argument. The judgment goes on to say that "the distinction is all important," but it does not explain what the distinction is. For my own part, I am unable to discover it. A man goes along a street, collects the names, addresses, and occupations of each dweller therein. What is the orginal composition of which, according to the Court of Appeal, he is the author? The name of the street? The numbers of the street? The names of the dwellers in the several houses? What is the distinction which the Court of Appeal makes in giving copyright to the result of this labour and reducing it into writing? What is it that makes it an original composition? But, further, where do the words "original composition" come from? (1) If the producer of such a book can be an author within the meaning of the Act, I am unable to understand why the labour of reproducing spoken words into writing or print and first publishing it as a book does not make the person who has so acted as much an author as the person who writes down the names and addresses of the persons who live in a particular street.

I observe that the Court of Appeal introduces the words "original composition" as if those were the words of the statute; and at another part of the judgment it is said that "the report and the speech reported are no doubt different things, but the printer or publisher of the report is not the 'author' of the speech reported, which is the only thing which gives any value or interest to the report." The sentence is a little difficult to construe, but, as I understand it, it means to convey that the thing to which the statute gives protection must be of some value or interest. Again, I am compelled to point out that such words are not to be found in the statute. The producer of this written composition is, to my mind, the person who is the author of the book within the meaning of the statute, and, as I have pointed out, the words "original

(1) See the quotation from *Caird* v. *Sime*, infra, p. 550.

composer" are not to be found in the statute at all; and, as I understand, the judgment of the Court of Appeal is entirely based on the thing protected being an original composition in the sense that the person who claims the protection of the statute must not have obtained his words or ideas from somebody else, but must be himself an original author in the sense in which that word is generally used in respect of literary composition.

I have been anxious to confine my views at present simply to the words of the statute, because it appears to me that, once this thing in respect of which the controversy has arisen comes within the language of the statute, it lies on those who deny the existence of the right to shew why the protection of the statute does not apply.

As I have pointed out, the judgment of the Court of Appeal rests solely on the use of the word "author," and I cannot help thinking that some confusion has been created between two very different things: one, the proprietary right of every man in his own literary composition; and the other the copyright, that is to say, the exclusive privilege of making copies created by the statute.

If the question here were whether there was the right to publish at all a speech made by some one who did not himself publish it, questions like those determined in this House in *Caird* v. *Sime* (1) might arise. Whether the speech was delivered so as to give it to all the world and to prevent the original author of it from restricting its publication is a question with which your Lordships have here no concern. Lord Rosebery is not here complaining of the publication of it, nor claiming any proprietary right in the speeches as delivered.

The question here is solely whether this book (to use the language of the statute), printed and published and existing as a book for the first time, can be copied by some one else than the producers of it (I avoid the use of the word "author"), by those who have not produced it themselves but have simply copied that which others have laboured to create by their own skill and expenditure.

(1) 12 App. Cas. 326.

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My Lords, I cannot help thinking that underlying the argument which has been addressed to us there is something of the contention which was boldly made nearly half a century ago in the case of *Maclean* v. *Moody* (1) in the Court of Session, where, relying on the preamble, the advocate argued that the object of the statute of Victoria was to encourage literary merit, that the intellectual labour constituting authorship was alone thereby protected, and that there could be no authorship without an author. Lord Deas refused to accept such an argument, and expressed the opinion that the Act did not confine the privilege to cases in which there was a known author. But it appears to me that, although it may be true that a preamble may be a guide to the general objects of the statute, it undoubtedly is unquestioned law that it can neither restrict nor limit express enactment. And though I think in these compositions there is literary merit and intellectual labour, yet the statute seems to me to require neither, nor originality either in thought or in language.

It is admitted apparently by the Court of Appeal (and indeed insisted on as part of the reasons for their judgment) that the owner of an unpublished manuscript, although not the author of it, acquires copyright in it by first publishing it. And I observe that it is said Lord Rosebery had no copyright in his speech, and although he could have acquired copyright in it by putting it into writing and printing and publishing it, he did not do so. Here, again, the implied proposition is that the only person who could gain copyright in his speech is the person who spoke it, and that the word "original" must by construction be read into the statute—that the true analogy is the true and first inventor of the patent laws.

I think the analogy is a false one. I do not find the word "original" in the statute, or any word which imports it, as a condition precedent, or makes originality of thought or idea necessary to the right. But if the analogy were strictly pursued, I think it would not be favourable to the defendant. An importer of a foreign invention is for the purpose of the patent laws an inventor, and, as Lord Brougham said in *Re Berry's*

(1) (1858) 20 Sc. Court Sess. Cas. 1154.

Patent (1), there were "two species of public benefactors—the one, those who benefit the public by their ingenuity, industry, and science and invention and personal capability; the other, those who benefit the public without any ingenuity or invention of their own, by the appropriation of the results of foreign inventions. Now the latter is a benefit to the public incontestably, and therefore they render themselves entitled to be put upon somewhat, if not entirely, the same footing as inventors." (An interesting discussion of this question will be found at page 98 of Wallace and Williamson's Patent Law Cases, just published.) I might paraphrase Lord Brougham's language by asking whether those who preserve the memory of spoken words, which are assumed to be of value to the public, are not entitled to a merit analogous to that which Lord Brougham attributes to the importer of foreign inventions.

My Lords, if I have not insisted upon the skill and accuracy of those who produce in writing or print spoken words, it is not because I think the less of those qualities, but because, as I have endeavoured to point out, neither the one nor the other are conditions precedent to the right created by the statute. That right, in my view, is given by the statute to the first producer of a book, whether that book be wise or foolish, accurate or inaccurate, of literary merit or of no merit whatever.

I must notice one supposed difficulty in this view very persistently urged at the bar. It is said that in the view I have suggested there would be as many copyrights as reporters. I do not see the difficulty. Each reporter is entitled to report, and each undoubtedly would have a copyright in his own published report; but where is the difficulty? Suppose a favourite view—a dozen artists take, each independently, his own representation of it. Is there any reason why each should not have his own copyright? Or even a photograph, where each photograph, if taken from the same point and in the same state of the light, would be identical in all respects. There is of course no copyright in the view itself, but in the supposed picture or photograph there is. And in truth there is a

(1) (1850) 7 Moo. P. C. 189.

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confusion of thought between the difficulty of proof of the piracy and the existence of piracy. Here, as I have said before, no such difficulty arises, since it is admitted that the report of these speeches is not the result of independent labour, but is simply taken from *The Times*.

My Lords, I think the judgment of North J. was right, and that the only answer sought to be given to it by the Court of Appeal was the restricted use of the word "author" with which I have endeavoured to deal. I therefore move your Lordships that the judgment of the Court of Appeal be reversed with costs, and the judgment of North J. restored.

LORD DAVEY. My Lords, the question in this appeal is whether the proprietors of *The Times* by assignment from their reporter are entitled to copyright in the reports published in their newspaper of certain speeches delivered by Lord Rosebery on public occasions. Copyright is the right of multiplying copies of a published writing. There is no copyright in a speech although delivered on a public occasion, and on the other hand there is no copyright under the statute in a piece of writing until it has been published. There may, indeed, be a common law proprietary right in a speech or lecture. In *Caird* v. *Sime* (1) Lord Watson said: "The author of a lecture on moral philosophy or of any other original composition retains a right of property in his work which entitles him to prevent its publication by others until it has with his consent been communicated to the public." It is not disputed in the present case that the thoughts and words of Lord Rosebery's speeches were communicated by him to the public, and no question is raised as to the existence of any right in the orator. This case raises only a question of statutory copyright in *The Times* report, and must be decided on the provisions of the Copyright Act (5 & 6 Vict. c. 45).

Now, what has the respondent done? He has admittedly copied and republished for his own profit certain sheets of letterpress forming parts of *The Times* newspaper. A sheet of letterpress is a book within the meaning of the Act, and, not-

(1) 12 App. Cas. 326, 343.

withstanding the decision of Malins V.-C. in *Cox* v. *Land and Water Journal Co.* (1), I have no doubt that a newspaper is within the Act. In *Walter* v. *Howe* (2) Sir George Jessel differed from the Vice-Chancellor, and his decision has since been followed. Primâ facie, therefore, the respondent has infringed the appellants' copyright in their newspaper. His defence is that the appellants have no copyright in this portion of their published work because it was compiled from, or consisted only of, matters which were publici juris. They say that Lord Rosebery was the author of his speech and gave it to the world for any to reproduce who would, and that nobody, therefore, can claim to be the "author" within the meaning of the Act of a report of his speech. The reporter, they say (with a pardonable jingle), is the reproducer and not the producer of the speech. That is true in a sense, and if *The Times* were claiming a property in the speech itself and seeking to prevent anybody else from publishing any other report of it, the argument would be cogent. But the appellants' claim is of a more modest description. They seek only to prevent the respondent from multiplying copies of their own report of the speech and availing himself for his own profit of the skill, labour, and expense by means of which that report was produced and published. But for the fact that the Court of Appeal thought differently, and one of your Lordships agrees with the learned judges, I should say that there is no answer to this claim.

In my opinion the reporter is the author of his own report. He it was who brought into existence in the form of a writing the piece of letterpress which the respondent has copied. I think also that he and he alone composed his report. The materials for his composition were his notes, which were his own property, aided to some extent by his memory and trained judgment. Owing to the perfection which the art of shorthand writing has attained in recent years, memory and judgment bear a less important part in the composition of a report of a speech than was formerly the case. But the question whether the composer has copyright in his report does not

(1) (1869) L. R. 9 Eq. 324. (2) (1881) 17 Ch. D. 708.

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seem to me to vary inversely with or to depend on his skill in stenography. Nor, as it appears to me, does the fact that the subject-matter of the report had been made public property, or that no originality or literary skill was demanded for the composition of the report, have anything to do with the matter. Again, it is said that the lucidity of diction and perfection of expression which characterise the eminent person named render an exact reproduction of his words a comparatively easy and almost mechanical task. But is it argued that the reporter of the hesitating or half-completed utterances of an inferior speaker might have copyright, though the reporter of Lord Rosebery may not? or does the question of copyright in the report depend on the clearness of thought and speech of the orator? In my opinion the question must be decided on general considerations, and not on any grounds which are personal either to the orator or to the reporter. Copyright has nothing to do with the originality or literary merits of the author or composer. It may exist in the information given by a street directory: *Kelly* v. *Morris* (1); or by a list of deeds of arrangement: *Cate* v. *Devon and Exeter Constitutional Newspaper Co.* (2); or in a list of advertisements: *Lamb* v. *Evans.* (3) I think those cases right, and the principle on which they proceed directly applicable to the present case. It was of course open to any other reporter to compose his own report of Lord Rosebery's speech, and to any other newspaper or book to publish that report; but it is a sound principle that a man shall not avail himself of another's skill, labour, and expense by copying the written product thereof. To quote the language of North J. in another case: "For the purposes of their own profit they desire to reap where they have not sown, and to take advantage of the labour and expenditure of the plaintiffs in procuring news for the purpose of saving labour and expense to themselves."

For these reasons I agree with my noble and learned friend in thinking that the judgment of the Court of Appeal should be reversed, and that of North J. restored.

(1) L. R. 1 Eq. 697. (2) (1889) 40 Ch. D. 500.
(3) [1893] 1 Ch. 218.

LORD JAMES OF HEREFORD. My Lords, in this case the appellants as plaintiffs in the suit allege that they are entitled to the copyright in reports which appeared in *The Times* newspaper of certain speeches made by Lord Rosebery, and they seek to restrain the respondent—the defendant in the suit—from republishing such reports. The facts upon which the suit is founded are not in dispute. Lord Rosebery's speeches being of great interest to the public, reporters representing different journals attended meetings to be addressed by him, and took down the words uttered by him. It may be taken that all of the reporters did their best to report Lord Rosebery's words accurately. The reports of these speeches appearing in *The Times* newspaper seem to represent a high degree of such accuracy. The respondent has copied these reports verbatim and reproduced them. For the purposes of this case it is admitted that the interests of the proprietors of *The Times* newspaper and of the reporter may be regarded as one.

The question, therefore, to be decided is whether there is any copyright in the reports of speeches made in public with the object that they should be published. The determination of this question depends upon the construction to be placed upon the provisions of the Copyright Act of 1842. It may be taken that the matter published in the columns of a newspaper is a "book" within s. 2 of that Act; but the plaintiffs in the suit have to establish that the proprietors of *The Times* or the reporter employed by them are the "authors" of such book within the meaning of s. 3. It is not alleged and it cannot be said that there is any authorship in the speech itself: that speech was created by the thought of Lord Rosebery and published by him to the world when he spoke it. The plaintiffs do not claim copyright in the speech itself, but, as stated by Lord Lindley in the Court of Appeal, the report of the speech is something different from and beyond the speech, and the question to be solved is whether this difference represents a something of which any one can be regarded as "the author" within the meaning of the Copyright Act.

Whilst the Act supplies no definition of the word "author," and whilst it may be difficult for any judicial authority to give

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a positive definition of that word, certain considerations controlling the meaning of it seem to be established. A mere copyist of written matter is not an "author" within the Act, but a translator from one language to another would be so. A person to whom words are dictated for the purpose of being written down is not an "author." He is the mere agent or clerk of the person dictating, and requires to possess no art beyond that of knowing how to write. The person dictating takes a share in seeing that the person writing follows the dictation, and makes it his care to give time for the writing to be made. But an "author" may come into existence without producing any original matter of his own. Many instances of the claim to authorship without the production of original matter have been given at the bar. The compilation of a street directory, the reports of proceedings in courts of law, and the tables of the times of running of certain railway trains have been held to bring the producers within the word "author"; and yet in one sense no original matter can be found in such publications. Still there was a something apart from originality on the one hand and mere mechanical transcribing on the other which entitled those who gave these works to the world to be regarded as their authors.

Now, what is it that a reporter does? Is he a mere scribe? Does he produce original matter or does he produce the something I have mentioned which entitles him to be regarded as an "author" within the Act? I think that from a general point of view a reporter's art represents more than mere transcribing or writing from dictation. To follow so as to take down the words of an ordinary speaker, and certainly of a rapid speaker, is an art requiring considerable training, and does not come within the knowledge of ordinary persons. Even amongst professional reporters many different degrees of skill exist. Some reporters can take down the words of a speaker however rapidly he speaks; others less practised or proficient cannot, as the term is, keep up with the rapid speaker. Apart from the dealing with the rapidity of speech, there are some reporters whose ears and thoughts and hands never fail them, and who therefore produce reports of complete accuracy. On the other

hand, reporters less skilled may be so deficient in this quality of accuracy as to produce reports which certainly tend to perturb the speakers whom they have endeavoured to report. Thus there seems to be a degree of skill in one class of reporters over the other. Again, one reporter may possess a knowledge apart from stenography which may confer upon him the power of producing a report not within the capability of another of the same calling. Supposing a speech were delivered in a language little used, such as Persian or Turkish, only a reporter acquainted with such a language would be able to report it. Does the work resulting from such special knowledge mean nothing? The proprietor of a journal may have paid highly for obtaining a special report of this almost unreportable speech. May he not make a claim for protection against a rival journalist who seeks to make equal use of the report thus obtained? It may also be that the report has been obtained under circumstances of peculiar difficulty on the one hand or of advantageous conditions on the other. Thus if a reporter attended a meeting of Anarchists intended to be secret and made their speeches public, or if in former times a man had secreted himself in one of the Houses of Parliament and taken down the words of different speakers, may it not be contended that the reporter was doing something more than merely transcribing?

After taking such matters as these into consideration, I have, after some doubt, come to the conclusion that a reporter of a speech under the conditions existing in this case is the meritorious producer of the something necessary to constitute him an "author" within the meaning of the Copyright Act of 1842, and that therefore the judgment of the Court of Appeal should be reversed.

LORD BRAMPTON. The only substantial question in this case is, whether the reporters who furnished to *The Times* the manuscripts containing the reports of Lord Rosebery's five speeches as they were published in that journal were the "authors" of those manuscripts, within the meaning of the Copyright Act, 1842 (5 & 6 Vict. c. 45). If they were, they were the authors of books within the interpretation clause, s. 2,

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and as such they would have been entitled to the copyrights thereof under s. 3, but for the fact that such copyrights have by assignments become vested in the appellants, the proprietors of *The Times*.

The material facts which have led me to the opinion I am about to express are admitted, and may be very briefly stated. On the several occasions when the speeches were delivered, reporters for *The Times* and other newspapers attended by invitation to enable them to compose and write, for publication in their respective journals, descriptive articles of the occurrences, containing full and accurate reports of the speeches as they were delivered from the lips of the speaker. The reporters who represented *The Times*, with whom alone I have now to deal, were undoubtedly gentlemen of education, great ability, and long and varied experience in the duties of their vocation. They wrote the descriptive parts of their reports from personal observation, the speeches they took down in shorthand, word for word, transcribed them verbatim in longhand, carefully corrected and revised and punctuated them, so that when they appeared in the columns of *The Times* they might, as perfectly as printed words could do, convey to the readers all that was to be seen or heard upon those occasions. From these reports all that appeared in *The Times* was first published to the world. It is obvious that the preparation of them involved considerable intellectual skill and brain labour beyond the mere mechanical operation of writing.

That the reports so published were "books" within the meaning of the Copyright Act is undisputed; the great contention throughout the case has been whether the reporters were the "authors" of them, for unless they were they could not acquire any copyright in them, the 3rd section of the Act conferring property in the copyright of a book only upon *its* author and his assigns. North J., before whom the case was first heard, held that although the reporter had no property in the speeches, he was entitled to copyright in his reports of them. The Court of Appeal reversed his ruling, and in a considered judgment emphatically stated that mere reporters were clearly not "authors" of what they report, that the Act was

passed to protect "authors" not reporters, that a mere publisher of another man's verbal utterances could not acquire a copyright as the author of such publication, and they held "that in order that the first publisher of any composition may acquire the copyright in it he must be the author of what he publishes, or he must derive his right to publish from the author by being the owner of his manuscript, or in some other way." I can find nothing in the Act which compels me to assent to this view. A speech and the report of it are two different things, and the author of the one and the author of the other are presumably two different persons. The author of a speech is the author of language orally uttered by himself. The author of the report of a speech is the author of a writing containing the substance or the words of that speech. The speech must precede the report of it. The oral speech is not a "book," the written report is. The book is the subject of copyright under s. 3, and the property in such copyright in a book is in *its* author.

I am not concerned to day in considering how and by what means the author of a speech can acquire the copyright and may preserve for himself the sole right to publish, in print or in writing, a report of it, for at no time has Lord Rosebery either by word or action indicated any desire or intention to do so. In making the speeches in question he published them freely and without placing any restraint upon those who heard him from making whatever use they could lawfully make of his words as they came from his mouth. Of course, if no reporters had been present, or if though present none had taken down his Lordship's utterances, those utterances must have remained unrecorded, and no question of copyright could have arisen, for there would have been no subject of copyright in existence. But let me suppose that, though unrecorded at the time, one of the hearers with a peculiarly retentive and accurate memory had, some time afterwards, from that unaided memory written a correct and verbatim report of the speeches. Would he not have been the author of that report? and might he not have claimed the copyright of it, the product of his own mental effort of memory? Or suppose the speaker had before delivering

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his speech composed and written out what he intended to say, and in speaking, refreshing his memory as to his intentions by that which he had written, had given oral utterance to every word of it, and then presented his manuscript to a friend as a gift, with permission to publish it as he thought fit, could not that friend claim the copyright of such publication? What real difference is there between a manuscript so obtained and a book made by writing down on the spot the words then freely uttered and given by the speaker to any reporter present who chose to record them expressly for the purpose of publication in the journal he represented? Of course, a person who merely writes an article from the dictation and as the servant of another can claim no property in what he so writes, for that writing belongs to his employer; but that is not this case.

I do not agree that the question of the authorship of a book depends upon the literary quality of it. If a person chooses (and many do) to compose and write a volume devoid of the faintest spark of literary or other merit, I see no legal reason why he should not, if he desires, become the first publisher of it and register his copyright, worthless and insignificant as it would be. The statute has prescribed no standard of merit in a book as a condition to entitle its author to become the proprietor of copyright in it. And, even if such standard were prescribed, I should think the merits of the book ought to be determined, having regard to the contents of the book itself, without inquiry as to whether any of the component parts of it emanated from the brain of some person other than the author of the book. Of course, if an author of a book is unscrupulous enough to pirate and include in it the protected composition of another, no registration could give him property in that which he had stolen or protect him against an action for his piracy. In this case the reporter, without encroaching upon the right of any one, has become the first publisher of "books" containing descriptive reports of the occurrences on the several occasions when Lord Rosebery's speeches were made. Nobody can say that such reports could be complete unless the speeches themselves were incorporated in them in some form or other; and, if they were rightfully so incor-

porated, it cannot I think be denied that in such report the speech, added to the descriptive passages, formed one book and one book only. True it is that the reporter was not the author of the speech; but he was the composer and author of the book. Without his brain and handiwork the book would never have had existence, and the words of Lord Rosebery would have remained unrecorded save in the memories of the comparatively few who were present on those occasions. In the descriptive passages of his report the language is his own, and although as regards the speeches he has given great value to his work by introducing verbatim the language of Lord Rosebery, he was strictly within his rights in so doing, and was clearly acting with the full sanction of his Lordship, in order that by its publication in *The Times* the thousands of the readers of that journal might be truthfully and accurately informed of those intellectual and interesting utterances of Lord Rosebery which they had not been privileged to hear.

I think, for the reasons I have given, that the proprietors of *The Times* have copyright in the articles and reports in question. I am, therefore, of opinion that the judgment of the Court of Appeal should be reversed, and the decision of North J. restored with costs.

LORD ROBERTSON. My Lords, I am of the same opinion as the Court of Appeal. The book published by the respondent, against which injunction is sought, consists of verbatim reports of certain speeches of Lord Rosebery. Prefixed to each speech there is a short note, explaining the occasion of the speech; but those notes are not taken from *The Times*. All that is taken from *The Times* consists of the words spoken by Lord Rosebery, without addition or subtraction.

Now, it is important to observe that the Court of Appeal have not decided, as an abstract proposition, that no report can be copyright of the reporter. There are reports and reports. Your Lordships remember how, in his reports of the Parliamentary debates, Dr. Johnson, according to his own avowal, "took care that the Whig dogs should not have the best of it"; and so largely do they bear the impress of the so-called

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reporter that, in some editions, those Parliamentary debates are included in Johnson's works. Take another kind of report, not extinct in our own times. Some extempore speakers do not speak in sentences, but in fragments of sentences; and yet next morning there appears, constructed out of those disjecta membra, a coherent and grammatical discussion of the subject. I can conceive cases where in truth the intellectual and literary contribution of the reporter may be as substantial as that of the speaker. But I mention such cases in order to say that we have here nothing of the sort.

The case before your Lordships is a case of shorthand reporting pure and simple. It so happens that Lord Rosebery's speeches are so conceived and expressed as to require on the part of the reporter nothing but literal accuracy in order to their presentation to the public as literary compositions. In so saying I am in no way disparaging the gifts of the shorthand writer, and, as the nature of his work is really of the essence of the present controversy, I dwell on it for a moment.

The reporters of *The Times* are educated gentlemen, as are many other practitioners of the art of stenography, while there are reporters less highly equipped in knowledge of literature and history. What is the difference between the educated and the less educated in reporting, let us say, Lord Rosebery? An allusion or a quotation is made by the speaker, more recondite or less hackneyed than those which do daily duty on the platform; the educated reporter recognises the allusion or the quotation and simply takes it faithfully down; the other reporter misses the point and tries to supply it himself, and the passage is blundered. Or a phrase or nuance occurs, finer or more exquisite than the parlance of paragraphs: by the one man it is appreciated and exactly taken down; by the other it is rejected as incredible and is supplanted by some banality, foreign to the diction of the speaker but congenial to that of his reporter. Now, the inference I draw from all this is that the contribution which education enables the good reporter to make to the speech is of a purely negative kind: he does not interfere, but faithfully acts as conduit. In fact, the merit of the reports now before your Lordships is that they present the

speaker's thoughts untinctured by the slightest trace or colour of the reporter's mind.

These observations apply to the stage of taking down in shorthand what the speaker says. The next stage, copying out the notes, is purely clerical work. Now I recognise the skill of the stenographer, I find that, for the reasons which I have mentioned, an educated man is the better qualified to be a faithful reporter. But I fail entirely to see how, in the widest sense of the term "author," we are in the region of authorship.

A very striking illustration of the subject is obtained by remembering who, or rather what, is the rival of a good stenographer: it is the phonograph. In reporting the kind of speech of which I am speaking—the speech of allusion and of phrase—the phonograph, which has no literary taste, good or bad, and no intellect, great or small, will record Lord Rosebery's speeches better than the best of reporters. The appellants think that if the owner of a phonograph publishes the speech as taken down by the phonograph he is the author of the report and entitled to copyright. I should have thought (and think) this a reductio ad absurdum of the whole argument of the appellants.

When it is remembered that there is no manner of composition, as the term is generally used, even in the sense of arrangement, by a shorthand reporter, I find it difficult to understand what attribute of an author belongs to him. Some of the judicial decisions have, indeed, applied the words of the Act to very pedestrian efforts of the mind. But although time-tables and furniture catalogues are not great things, there has been structure and arrangement on the part of the maker. I think that the recording by stenography the words of another is in a different region from the making up a time-table. I do not say it is lower or higher, but in a different plane, because there is no construction. Upon this clear principle I reconcile those decisions with the judgment which I am now supporting. Nor do I consider it legitimate to justify a novel application of the Copyright Act by treating its most extreme applications as if they represented its normal scope. I do not think that a

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sound method of dealing with any statute. I prefer the tone and the words of my noble and learned friend Lord Davey in 1894, when, in *Hollinrake* v. *Truswell* (1), he thought that the preamble of the Act might be usefully referred to for the purpose of ascertaining the class of works it was intended to protect. The word "author," occurring as it does, not in the preamble, but in the enacting section, seems to me to present a criterion consistent with the widest application of the Act to all who can claim as embodying their own thought, whether humble or lofty, the letterpress of which they assert the authorship. The fact that the man who speaks in public is not a competitor with the reporter for copyright has not the slightest effect in altering the intellectual relation of the reporter to the words of the speech, nor does it render less inappropriate the result of holding the statute to confer on the stenographer a reward which has no relation whatever to his art.

For these reasons I am unable to concur in the judgment proposed.

THE EARL OF HALSBURY L.C. said that the judgment of North J. having been for an interim injunction, and the parties having agreed when in the Court of Appeal that the case should be treated as if it were a hearing of the cause, there would be judgment in this House for a perpetual injunction.

Order of the Court of Appeal reversed with costs here and below: Judgment for a perpetual injunction: Cause remitted to the Chancery Division.

Lords' Journals, August 6, 1900.

Solicitors: *Soames, Edwards & Jones; Upton, Atkey & Co.*

(1) [1894] 3 Ch. 420, 428.

[PRIVY COUNCIL.]

WILLIAMS . . . . . DEFENDANT;

AND

PAPWORTH AND OTHERS . . . . . PLAINTIFFS.

J. C.*
1900
July 5, 21.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Real Property Act, s. 117—Interest in Land—Construction—Limitation—Sect. 122—Rights of Beneficiaries whose Trustees are barred.

Where a rent-charge or annuity is held by trustees to be applied by them for the maintenance and education of children or the survivor:—

Held, that the children take a joint interest therein, but that the shares of the minors are to be applied as directed.

The interest of each child is an interest in land within the meaning of the New South Wales Real Property Act, s. 117.

Where the estate out of which the rent-charge issued passed to a bankrupt's assignee under a certificate of title negligently granted to the bankrupt free of incumbrance:—

Held, in an action brought by the beneficiaries against the Registrar-General for compensation out of the assurance fund created by the said Act, that their rights, being under the Act independent of the trustees and being saved by the provisions of the Act (see s. 122) in regard to persons under disability, could be enforced notwithstanding that their trustees' rights were barred.

APPEAL from an order of the Supreme Court (Aug. 8, 1899) discharging a rule nisi to set aside a verdict for the respondents and to enter a non-suit or a verdict for the appellant in an action brought to recover damages against the Registrar-General of the Colony under the Real Property Act, 26 Vict. No. 9.

The question raised in the action was whether, under the provisions of the Act, and particularly ss. 117 and 119, the respondents were entitled to compensation out of the assurance fund established by the 28th and other sections of the Act, on

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY STRONG.

J. C. 1900 WILLIAMS v. PAPWORTH.

the ground that they had been deprived of an interest in land and had sustained loss and damages in consequence of the erroneous registration under the Act of one Frank McDonald as proprietor in fee simple of certain lands and hereditaments in the city of Sydney, without any notification on the certificate of title, as required by the Act, of a subsisting annuity deed. By such annuity deed, which was dated December 18, 1883, the lands and hereditaments had been conveyed by Frank McDonald to trustees upon trusts for the payment thereout of an annuity to Sarah Theresa Smith during her life, and after her death to or for the benefit of her children, the respondents, and under such registration Frank McDonald acquired an indefeasible estate in the lands and hereditaments free from incumbrances, including the incumbrance created by the annuity deed.

Swinfen Eady, Q.C., and *Vaughan Hawkins*, for the appellant, contended that the respondents were not entitled either jointly or severally to any estate or interest within the meaning of the Real Property Act in the land comprised in the certificate of title issued to Frank McDonald. Their title, if any, was under the deed of December 18, 1883. The special trust created by that deed was for the benefit of a class of persons, all of whom might have been, and one of whom in fact was, born after the date of the deed. The trust purported to be continued throughout the lives of such persons and the life of the survivor. It was submitted that a trust of this character was void for remoteness. The respondents had not, therefore, such an estate or interest as would enable them to maintain this action. Besides, if the trust were valid, still, according to the true construction of the deed, the children had not such a definite and ascertained interest as is contemplated by the Act. For the trustees were empowered at their own discretion to apportion the annuity among the children according to their needs. While there were more than one their interests were dependent on the will of the trustees. Until they were reduced in number to a single survivor the interest of each was unascertained. Reference was made to *Booth* v.

Booth (1); 1 Jarman on Wills, 5th ed. pp. 229, 234; *In re Coleman, Henry* v. *Strong.* (2) The claims, if any, of the trustees, and therefore of the respondents as their cestuis que trust, are barred by lapse of time and by s. 122 of the Real Property Act.

Isaac Badcock, Q.C., and *Dighton Pollock*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The respondents, the children of Mrs. Sarah Theresa Smith, now deceased, claiming by virtue of a settlement dated December 18, 1883, brought an action for damages against the appellant, the Registrar-General for the Colony of New South Wales, as nominal defendant, under ss. 117 and 119 of the Real Property Act. Their case was that they had been deprived of an interest in land under circumstances which, in the events that had happened, gave them a right to compensation out of the assurance fund established by the Act.

In the Colonial Courts the defendant resisted the claim on two grounds. He contended (1.) that the interest of the plaintiffs under the settlement was not an interest in land within the meaning of the Act; and (2.) that if it was such an interest the action was out of time.

By consent a verdict was found for the plaintiffs for 10,500*l.*, leave being reserved to the defendant to move to set aside the verdict and to enter a non-suit or a verdict for the defendant.

A rule nisi was accordingly obtained.

It was discharged with costs by the Full Court.

The judgment of the Court was delivered by Darley C.J. The judgment is so clear and concise that their Lordships would have been satisfied to affirm it without further comment if the appeal to this Board had not raised a new point on the construction of the settlement of December, 1883.

By that settlement certain land was conveyed to trustees upon trust during the life of Mrs. S. T. Smith, to raise an

(1) [1894] 2 Ch. 282. (2) (1888) 39 Ch. D. 443.

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annuity or yearly rent-charge of 416*l.* to be paid to her for her separate use. After the death of Mrs. S. T. Smith, which happened on January 6, 1890, the trustees during the lives of her children and the life of the longest survivor were to receive and take by and out of the rents, issues, and profits of the said hereditaments an annuity or yearly rent-charge of 416*l.*, "the said annuity or yearly rent-charge to be applied by the said trustees or trustee for the maintenance and education of such children or child as aforesaid." After the death of the survivor of the said children a like annuity or rent-charge was to be paid to James Club Smith, the husband of Mrs. S. T. Smith, for his life. Subject to the foregoing trusts, the premises were to be held in trust for Frank McDonald, his heirs and assigns. Afterwards, in 1889, Frank McDonald brought the land under the provisions of the Real Property Act without disclosing the settlement of December, 1883; and although the settlement was at the time duly registered in the office, McDonald, through some error or oversight on the part of the officials, obtained a certificate of title free from the incumbrance created by the settlement. McDonald, however, still went on paying the annuity to the trustees until his bankruptcy, which happened in September, 1897. It was then discovered that by the certificate Frank McDonald had acquired an absolute title to the land, and that the land was vested in him at the time of his bankruptcy, subject only to certain mortgages and incumbrances created subsequently to the date of the certificate. The rights of the trustees were then barred, but the rights of the children, if their rights are independent of the rights of their trustees, are saved by the provisions of the Act in regard to persons under disability.

It was argued by the learned counsel for the appellant that the limitation in favour of the children, one of whom was born after the date of the deed, was void for remoteness. They said that, according to the true construction of the settlement, the trustees had a discretionary power of apportioning the annuity among the children according to their several necessities, and that, consequently, until the class became reduced to one individual the children had only an uncertain and unascertained

interest. They relied upon the use of the word "applied," and upon the direction that the annuity was for "maintenance and education." But the word "applied" does not import a power of selection: it simply means "devoted to" or "employed for the special purpose of." Nor is a provision for the maintenance of adults anything more than a provision for their benefit. In the opinion of their Lordships the meaning of the words used in the settlement is perfectly clear. The children take a joint interest in the annuity, but the shares of minors are to be applied for their maintenance and education. On a point which seems so plain it is hardly necessary to refer to authority; but there are plenty of cases on wills where similar words have received a judicial construction. In *Lewes* v. *Lewes* (1) certain estates were devised to trustees in trust to receive the rents and pay thereout the yearly sum of 300*l.* for and towards the maintenance, clothing, and education of all and every the children of the testator's eldest son in equal shares and proportions during the life of the son. The eldest son had three children, one of whom died in his father's lifetime. The Vice-Chancellor said: "There is no sensible way of dealing with this case except by taking the words 'for the maintenance, clothing, and education' to be equivalent to 'for the benefit of' the children"; and he therefore declared that the personal representative of the deceased child was entitled to one-third of the 300*l.* a year during the life of the father. So in *Soames* v. *Martin* (2), a gift for the maintenance and education of an infant where there was no disposition of the principal was held to be a gift for life; and again in *Wilkins* v. *Jodrell* (3), where there was a gift of an annuity to a lady for life, and in the event of her death "to be continued to her children for their maintenance and education" with a request to a person named by the testator "to see it carried into execution," the children were held entitled to the annuity during their lives and until the death of the survivor of them, and it was determined that they took the annuity "for their lives and the lives and life of the survivors and survivor of them

(1) (1848) 16 Sim. 266. (2) (1839) 10 Sim. 287.
(3) (1879) 13 Ch. D. 564.

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being entitled as joint tenants unless they severed the joint tenancy."

As regards the two points which were argued and disposed of in the Full Court, their Lordships have little or nothing to add. It could not, of course, be disputed that the expression "interest in land," unless there was something to restrict the meaning, must include equitable as well as legal interests. But it was argued that the scope of the Act rightly understood requires such a restriction; otherwise it was said the labour thrown upon the office would be enormous, if not intolerable. It seems rather difficult to support that contention when the Act (s. 14) requires every applicant for registration to state the nature of his estate or interest in the property, and the nature of every estate or interest held therein by any other person "whether at law or in equity," and provides (s. 17) that if it appears that any parties beneficially interested in the land which is the subject of the application are not parties to the application, notice is to be served on all persons who shall appear to the Commissioners to have any interest in the land. Again s. 110, which was referred to during the argument, speaks of beneficiaries claiming an estate or interest in the land there referred to.

Their Lordships also agree with the Full Court in thinking that the circumstance that the trustees are barred by limitation is no ground for holding that the beneficiaries are barred too. The statute gives a right of action to any person deprived of an interest in land through the bringing of such land under the provisions of the Act. The remedy is a statutory remedy. It is to be worked out by an action, not against individuals competing for possession of land, but against a fund specially provided by a system of insurance in order to compensate persons who, without any fault of their own, may have been deprived of their property in the course of carrying out a new scheme. There seems to be no reason why the remedy should be denied to persons who are within the very terms of the Act, and have actually sustained a loss of property, because other persons who were their trustees have lost a right of action and nothing else.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal.

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Solicitors for appellant: *Light & Galbraith.*
Solicitors for respondents: *Hunters & Haynes.*

[PRIVY COUNCIL.]

BEAUDRY . . . . . PLAINTIFF;

AND

BARBEAU ET AL ÈS-QUAL AND LEBLANC ET AL ÈS-QUAL (MIS-EN-CAUSE) . . . } DEFENDANTS.

J. C.* 1900 *July* 4, 28.

AND CROSS-APPEAL.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Will—Construction—Substitution—Annuity—Accumulations.

A testator set apart a fund as a provision for his wife and also for his children until majority or marriage. He gave the residue of his estate to his children living at his death, and directed that it should be divided on the death of all of them. He further directed that from majority or marriage each child was to receive the revenue derivable from his share limited to $6000 a year, each child being charged with a substitution in favour of his or her children:—

Held, in a suit brought by the eldest son to recover arrears of his annuity of $6000 a year, that according to the true intention of the testator as disclosed by the words of the will—

(1.) the annuity of each child is a charge on the revenue of his own share and its arrears, not on the total revenue of the estate;

(2.) each child was entitled from the testator's death to an equal share of the net revenue current and accumulated: without regard to the benefits which during minority he receives from the fund set apart or under other clauses of the will;

(3.) the substitution is confined to the share of each child in the capital of the residue, and does not extend to the accumulation of its revenue.

CROSS-APPEALS from a decree of the Court of Queen's Bench, appeal side (June 23, 1899), affirming by a majority

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY STRONG.

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of three to two judges a decree of the Superior Court (May 12, 1899).

The appellant sued under the circumstances stated in the judgment of their Lordships, the executors of his father's will, and also his mother, Leblanc, as tutrix of his minor brothers and sisters, and Rouer Roy, as curator of the substitutions created by the will; praying for a declaration that he was entitled under the will to an annuity of $6000, so far as the income of the testator's estate, whether accumulated since the testator's death or actually accruing, should suffice, and for payment of two quarters of such annual sum.

The executors submitted to the judgment of the Court, referring to the admitted fact that the annual income of the estate was only $18,000, and was insufficient to pay each of the children $6000 a year without having recourse to the accumulated income, which then amounted to $178,000.

The respondents' mis-en-cause pleaded, in effect, that under the will the minor children had a right to an equal share with those who were of age in the income of the estate, whether accumulated or accruing, and that those who were of age had a right to an annual sum of $6000 only so far as the income, as well accumulated as accruing, should reach an amount sufficient to leave an equal sum for each minor, and they concluded for a declaration and judgment to that effect.

The material clauses of the will are set out in their Lordships' judgment.

Both Courts below held that on the true construction of the will the appellant was entitled to receive his annuity only out of his own share of the estate—that is, out of its income accumulated and accruing; and that each child was entitled to an equal share of the estate and its income from the death of the testator.

The grounds of their decisions were that, although the testator limits his children's enjoyment of the property at an annual sum of $6000 each, there was nothing in the will to take away from them their right to the income which was by law accessory to the respective shares in the corpus given to them by the original gift, and that the clause of substitution extended

only to the property as it existed at the testator's death, and not to the surplus rents and profits which had accrued since that date.

Aimé Geoffrion, Q.C., for the appellant, contended that this construction led to serious inequality between the testator's children at the expense of the elder children in favour of the minors. In the absence of any clear indication of an intention to the contrary, it should be presumed that the testator wished to place his children on an equal footing. The provision for the maintenance of the minor children by the testator's widow out of the life-rent bequeathed to her pointed to the conclusion that during minority the children are not entitled to receive a specific share of the net income of the estate. There are no words in the will by which the right of those children who are of age to claim payment of their annuities out of the net income of the estate is limited to an aliquot portion thereof. The children were not intended to be institutes of aliquot shares of the estate in the strict sense. They were intended to be legatees of alimentary allowances or annuities charged on a common fund, consisting of the net income of the estate from the time of the testator's death. It is the substitutes who are the chief objects of the testator's bounty. The institutes had not even the right of possession. They were intended to have their annuities secured to them and rendered payable out of the whole net income of the estate, accumulated and accruing, subject to abatement only when the total net income became insufficient.

Brosseau, Q.C., for the respondents, the executors, who were also cross-appellants. He contended that under the will the children had no interest in the estate till majority or marriage; that they were only entitled to their annuities out of the income accruing after they attained majority or marriage; that each child was entitled only to a share of the income accruing subsequently to its becoming entitled; and that under the will everything which the children are not to receive and enjoy is included in the substitution in favour of their children and descendants. In other words, all

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accumulated income should be treated as capital, and, therefore, subject to the clause of substitution. The substitutes were the beneficiaries whom the testator had mainly in view. There is no indication in the will that the testator contemplated his net income proving insufficient to pay all the annuities. But if it should be held that any deficiency may be made up out of accumulations, then it was contended that the right of each child was limited to the accumulation in respect of its own share. He cited art. 971 of the Civil Code of Lower Canada.

Haldane, Q.C., and *Coles*, for the widow and minor children, respondents mis-en-cause in both appeals, contended that the construction put upon the will by both Courts was right, and the only construction which was consistent with its plain words. The testator's children became owners of the residuary estate in equal shares as from the testator's death. The right to the income belongs to them as accessory to the ownership. The restriction imposed by the testator on their actual enjoyment of the income does not alter the nature or extent of their respective rights to that income as between one another. There is nothing in the will which interferes with the rule of law which makes income accessory to ownership. The substitution is in terms limited to the corpus of each share, and does not extend to its income accumulated or accruing, the whole of which belongs to the institute absolutely. As regards the inequalities which result between the younger and the elder children, they may have been intended or overlooked. Conjecture as to the testator probably intending equality of treatment cannot override or modify the words of his will.

Geoffrion, Q.C., replied, and, in answer to the cross-appellants' contention in favour of the substitutes, cited Thévenot D'Essaule De Savigny's Traité des Substitutions, p. 88, Nos. 253 et seq., also p. 211, Nos. 641 and 643, and arts. 965 and 969 of the Civil Code of Lower Canada.

1900 *July* 28.

The judgment of their Lordships was delivered by

SIR HENRY STRONG. These are two appeals from a judgment of the Court of Queen's Bench dismissing appeals by the same

parties from the original judgment of the Superior Court. The action was instituted by the appellant Jean Charles Victor Beaudry against the trustees and executors of the will of his father Victor Beaudry to recover $3000, being the first half-yearly payment of an annuity of $6000 bequeathed to him by the will in question.

Victor Beaudry, who died in 1888, by his will, made in authentic form, after certain specific bequests in favour of his wife Marie Angelina Leblanc, gave to her an annual life-rent of $12,000, to be reduced to $9000 in the event of her second marriage. This life-rent was declared to be by way of a personal provision for his wife and for their children until the age of majority or until provided for by marriage.

The testator gave the residue of his property to his children who might be living at the time of his death, and in the event of the death of any of them to their respective children, declaring that the children of each of his children should be considered as one root and take the share of their parent. He charges each of his children with a substitution in favour of their respective children, and meantime he places his estate in the hands of trustees, who are to administer it until the death of all his children, when a division is to be made of the property comprising his estate. He directs that each of his children should only receive from the time of majority or from marriage the revenue derivable from his estate to the amount of $6000 a year, with the proviso, however, that if his daughters should marry contrary to his wishes as indicated in his will, then their annuity should be reduced to $2000. Finally he authorizes his trustees to pay to each of his sons, on attaining the age of twenty-five years, the sum of $25,000 for the purpose of enabling them to establish themselves in business, to be taken out of and to diminish their respective shares in the mass of his estate.

The questions arising for decision in the action related exclusively to the proper legal interpretation of so much of the will as has been above stated.

Different pretensions were set up by the plaintiff, by the trustees and executors, and by the testator's widow, who, as

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tutrix of the minor children, was together with the curator to the substitutions put in cause in the action.

The cause having been heard in the Superior Court by Tellier J., judgment was rendered therein on May 12, 1899, whereby it was declared that Jean Charles Victor Beaudry was entitled from September 3, 1898, the date of his coming of age, to an annual sum of $6000, to be taken from his share of the net current annual revenue of the estate if sufficient, and in case of its insufficiency from the revenue which had accumulated from the death of his father, but only from his share, being one-fifth of such current and accumulated revenue, and only so long as his share in the current and accumulated revenue should be sufficient to pay such sum to him annually; and it was further declared that each of the children, whether of age or a minor, is entitled to an equal share from the death of their father of the net revenue of the estate, and the trustees were condemned to pay to the plaintiff out of his share of the current and accumulated revenue $3000 for two quarterly payments of his annuity, with costs to the other parties to the cause against the trustees.

From this judgment Jean Charles Victor Beaudry as well as the trustees appealed to the Court of Queen's Bench. By the judgment of the latter Court, dated June 23, 1899, both appeals were dismissed, that of Jean Charles Victor Beaudry with costs, and that of the trustees with costs to them payable out of the estate.

This judgment was rendered by a majority of the Court, consisting of Wurtele J., Blanchet J., and Bossé J., two of the learned judges who heard the appeals (Hall J. and Ouimet J.) having dissented.

The reasons upon which the majority proceeded are set forth in the opinion of Wurtele J.

The contentions of the parties in the Courts below as well as before this Board at the argument of the present appeal were as follows: Jean Charles Victor Beaudry insisted that he was entitled to be paid his annuity of $6000 a year, and that the whole net revenue and accumulated arrears were available for this purpose, and that he was not to be restricted to a one-fifth

share of the revenue and accumulations. The trustees insist that the claim of the first-named appellant is to be confined to a one-fifth share of the current net revenue, and that he is not entitled to resort to the accumulations even to the extent of his own one-fifth share of these moneys.

The tutrix and curator to the substitution, whilst conceding that to the extent of a one-fifth share the legatee claiming is entitled to have both the current net revenue and the accumulated revenue applied to the payment of his annuity, resist his claim to have the whole of the revenue and accumulations beyond his own one-fifth share so applied in payment of his annuity.

The last position has been maintained by both the Courts below, and their Lordships are of opinion that these decisions are in all respects right.

In interpreting a will the intention of the testator, which is to be arrived at solely from the language in which he has expressed himself, is, as Wurtele J. has well observed, the only guide to be followed. Arguments derived from the assumption that the testator must have intended absolute equality in a disposition in favour of his children are unavailing and inadmissible so far as they are not in accord with the actual words in which the gift is expressed. It is, therefore, impossible to give effect to the contention raised on behalf of the eldest son that the younger children, who are entitled to be maintained out of the annuity of $12,000 bequeathed to their mother until they attain their majorities whilst the income of their shares of the residue are accumulating, will derive greater benefits under the will than are conferred upon him, and, therefore, that the arrears of his annuity ought to be paid out of the mass of the estate and not confined to his own one-fifth share. To do this would involve a variation of the terms which the testator has used in the bequest of the residue of his estate. This gift is to all the testator's children of the first degree living at his death, without regard to their respective ages or to the benefits they are to receive through their mother, or otherwise under other clauses of the will. The judgment under appeal, therefore, properly rejects the claim of the eldest son to any advantage

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which would confer upon him more than an equal share with his brothers and sisters, and more than the revenue of that share, whether current or accumulated. Again, to adopt the pretension of the trustees, who wish to treat the accumulations of the income of the share of the eldest son during his minority as an addition to his share of the capital, and therefore as subject to the substitution, would be to offend in another way against the rule of construction referred to. The testator has confined the substitution he has created to the share of the residue which he has bequeathed to his children respectively —that is to say, to the capital of that share; to include the income in the substitution would be to add to the will an additional disposition not warranted by the testator's language, and in no way authorized by the provision restricting the annuities payable to the legatees to $6000 per annum. The result is that the accumulations arising from revenue during minorities belong absolutely to the legatees, who can dispose of them by will as the Court of Queen's Bench has held. For these reasons their Lordships will humbly advise Her Majesty to dismiss these appeals.

As regards costs, their Lordships were informed by counsel that this litigation has been throughout of a friendly character, and was instituted for the purpose of obtaining the opinion of the Courts on the interpretation of the will, and this being so, their Lordships are of opinion that the costs in both the Courts below, as well as those of these appeals, should be paid by the trustees out of the estate, and that the last-mentioned costs should be taxed as between solicitor and client.

Solicitors for all parties: *Simpson & Co.*

[PRIVY COUNCIL.]

FLEMING . . . . . PLAINTIFF;

AND

BANK OF NEW ZEALAND . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

J. C.*
1900
May 17, 22, 24; *June* 27.

Principal and Agent—Authority of Agent—Consideration moving from the Principal—Special Damage.

The plaintiff's agent obtained from the defendant bank a promise to pay certain cheques drawn by the plaintiff in consideration of his depositing with it a store warrant in lieu of the cash which the plaintiff had instructed him to pay to the credit of the plaintiff's account. The store warrant belonged to the plaintiff, was under pledge to the agent, and was accepted by the bank with full knowledge of the circumstances:—

Held, in an action for dishonouring the cheques, that the agent in substituting the deposit for cash did not exceed his authority, but that even if he had, the contract was complete, for there was consideration for the bank's promise. The deposit conferred on the bank some right, interest, profit, or benefit within the legal meaning of consideration; and in the circumstances it could not be heard to say that that consideration did not move from the plaintiff:

Held, further, that evidence of special damage—that is, of plaintiff's loss of custom and credit from particular individuals—was wrongly admitted; special damage not having been alleged.

APPEAL from a decree of the Court of Appeal (Feb. 4, 1899) reversing by a majority a decree of Pennefather J. in the Supreme Court of New Zealand, Otago, and Southland District, sitting at Invercargill.

The action was to recover 10,000*l.* damages for breach of agreement to pay on presentation certain cheques drawn by the appellant on the respondent bank.

The verdict, under the circumstances stated in the judgment of their Lordships, was for 2000*l.* The case being reserved for further consideration, the appellant moved for judgment, and the respondents moved for a nonsuit, or for judgment, or for a new trial.

* *Present:* LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, SIR HENRY DE VILLIERS, and SIR FORD NORTH.

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On August 19, 1898, Pennefather J. gave judgment for the appellant for 2000*l*. He held that (1.) there was evidence to go to the jury of the special contract alleged by the appellant, and that there was consideration for the said contract; (2.) that the ratification by the appellant of his agent's unauthorized contract with the respondents was too late after breach thereof by the respondents, but that the respondents were estopped by their conduct from relying on the agent's want of authority.

The Court of Appeal ordered judgment to be entered for the respondents, being of opinion that the finding of the jury, to the effect that the contract between the respondents and Thompson (the plaintiff's agent) to accept the store warrant as a consideration for honouring the plaintiff's cheques, could not be relied upon by the plaintiff, inasmuch as the jury also found that Thompson had no authority to make such a contract; that in making the contract, substituting the warrant for cash, Thompson was not the plaintiff's agent; that the ratification of the contract by the plaintiff was too late after breach thereof by the respondents, and that there was no estoppel as between the plaintiff and the respondents. Denniston J. held that the respondents were not entitled to rely upon Thompson's want of authority, because they made the special contract, by which they agreed to accept the store warrant instead of cash, with full knowledge that Thompson had not any specific authority from the plaintiff to give the store warrant instead of cash, and ratification by the plaintiff of the variation in the contract was not made by the respondents a condition precedent to their obligation to pay the cheques, and that under those circumstances the question of ratification by the plaintiff after breach by the respondents did not arise. The Court of Appeal further held unanimously that, assuming the respondents were not entitled to judgment, they were entitled to a new trial on the ground of the admission of improper evidence as to damage—see *Ratcliffe* v. *Evans* (1)—in that evidence was admitted to prove the loss by the appellant of particular customers, though no special damage

(1) [1892] 2 Q. B. 524.

was alleged in the statement of claim, and on the ground that the damages were excessive.

Asquith, Q.C., and *J. W. M'Carthy*, for the appellant, contended that this judgment was wrong. The appellant was entitled to rely on the contract made between his agent Thompson and the bank. The bank agreed to accept the store warrant deposited by the agent as the equivalent of the cash which the appellant had instructed him to pay to the credit of his account. All the facts were known to the respondents. They knew that the contract made by Thompson was substantially that which he was authorized to make, and that there was no substantial difference between the terms concluded and the terms authorized, for the store warrant was accepted as the equivalent of cash. But even if the exact terms were unauthorized previously by the appellant, they were subsequently ratified by him. There is no authority for saying that a contract cannot be ratified after breach or repudiation: see *Bolton* v. *Lambert*. (1) The only cases in which a principal cannot ratify subsequently is where other rights have supervened, as in *Bird* v. *Brown*. (2) Even assuming that the appellant could not ratify after breach, the respondents were, for the reasons stated by Denniston J., estopped by their contract from relying on Thompson's want of authority, for they contracted with him as agent with full knowledge of the extent of his authority. With regard to the quantum of damages, a fair construction of the evidence shews that the appellant sustained by the conduct of the bank special damage as a buyer of sheep.

Cohen, Q.C., and *W. Wills*, for the respondents, contended that there was no reasonable evidence to go to the jury of any contract between the bank and the appellant. The evidence shewed that Thompson had no authority from the appellant to make the deposit relied upon. His authority was to obtain the bank's promise conditioned upon cash being placed to the credit of his account. The actual consideration did not move from the appellant, who did not ratify the deposit, or if he did

(1) (1889) 41 Ch. D. 295. (2) (1850) 4 Ex. 786; S. C. 19 L. J. (Ex.) 154.

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it was after the contract had been repudiated by the bank. *Bolton* v. *Lambert* (1) does not apply, and, moreover, was wrongly decided: see also *Williams* v. *North China Insurance Co.* (2) *Bolton* v. *Lambert* (1) was decided on the authority of *Hagedoon* v. *Oliverson* (3), which it was argued depended upon peculiarities of insurance law specially applicable to that case. A broker is not interested in an insurance, but he can sue on it in his own name: see Arnould on Insurance, 6th ed. p. 231, 233. Reference was also made to *In re Portuguese Consolidated Copper Mines, Limited, Ex parte Badman* (4), and to Fry on Specific Performance, s. 303, and Appendix, p. 711. See also *Managers of the Metropolitan Asylum Board* v. *Kingham* (5); *Walter* v. *James.* (6) Ratification comes too late if the offer has been withdrawn: see *Dickinson* v. *Dodds.* (7) With regard to estoppel, it ought to have been pleaded: see *Low* v. *Bouverie.* (8) With regard to special damage and the admissibility of evidence thereon, see *Ratcliffe* v. *Evans* (9), where numerous cases are cited shewing that the term is used in different senses (10), and that, where there is a right to general damage, special damage must be alleged with reasonable particularity before it can be investigated or recovered.

Asquith, Q.C., replied.

1900 *June* 27.

The judgment of their Lordships was delivered by

LORD LINDLEY. This is an action brought in New Zealand by the plaintiff against his bankers for dishonouring certain cheques. The action was tried with a jury, and the plaintiff obtained a verdict and judgment for 2000*l.* damages. The defendants appealed, and the Court of Appeal not only set aside the verdict and judgment, but entered judgment for the defendants with costs. From this decision the plaintiff has appealed to this Board.

The plaintiff was a farmer and stock dealer in an extensive way of business. He was a large buyer of sheep, for which he

(1) 41 Ch. D. 295.
(2) (1876) 1 C. P. D. 757.
(3) (1814) 2 M. & S. 485; 15 R. R. 317.
(4) (1890) 45 Ch. D. 16.
(5) (1890) 6 Times L. R. 217.
(6) (1871) L. R. 6 Ex. 124.
(7) (1876) 2 Ch. D. 463.
(8) [1891] 3 Ch. 82.
(9) [1892] 2 Q. B. 524.
(10) [1892] 2 Q. B. 528.

was in the habit of paying cash. He was in good credit, but in August, 1897, his account with his bankers was overdrawn to the extent of 859*l.* He had made an arrangement with them for an overdraft to the extent of 1200*l.* The plaintiff had in August and September, 1897, a large number of sheep in the hands of the Southland Frozen Meat and Export Company, and these sheep were at the plaintiff's disposal, and were available as a security if the plaintiff desired to borrow money upon them. Mr. Chisholm was the bank manager and Mr. Thompson was the manager of the Frozen Meat Company.

On August 28, 1897, the plaintiff and Chisholm had a conversation about the plaintiff's overdraft; about the sheep he had in store with the Frozen Meat Company; and about further purchases of sheep which the plaintiff might desire to make. The plaintiff and Chisholm gave different accounts of this conversation, Chisholm maintaining that these sheep were to be a security for the plaintiff's overdraft, whilst the plaintiff maintained that no pledge of these was ever made. The verdict of the jury has rendered it unnecessary to refer more in detail to this part of the case.

On September 4, 1897, the plaintiff drew on the defendants four more cheques for sums amounting in the aggregate to 658*l.* 17*s.* 2*d.*, in payment of sheep then bought by him. In order to provide for the payment of these cheques the plaintiff asked Thompson to see Chisholm, and to pay 1000*l.* into the bank to the plaintiff's credit to meet these particular cheques. Thompson knew nothing of the plaintiff's overdraft. On September 6, 1897, Thompson saw Chisholm and explained his mission, but proposed that as a matter of convenience to the Frozen Meat Company he should deposit a store warrant for sheep instead of cash. This Chisholm assented to. A store warrant for 2250 sheep belonging to the plaintiff and valued at 1000*l.* was accordingly sent to the bank on the same September 6. Thompson then supposed that the cheques, to meet which he had deposited the warrant, would be paid on presentment. Chisholm appears to have understood that the store warrant was to secure the plaintiff's old overdraft. Whatever the explanation may be, the fact is that after Chisholm

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had received the store warrant the cheques were presented for payment at the bank and were dishonoured. This is the plaintiff's grievance and cause of action. The next day Chisholm sent to the holders of the cheques, and they were again presented at the bank and were then paid. The real controversy at the trial was whether the store warrant was deposited by Thompson to meet the four cheques drawn by the plaintiff on September 4, or whether it was deposited to cover the old overdraft. Another question raised at the trial was whether Thompson exceeded his authority in obtaining credit from the bank on the security of the store warrant instead of placing 1000*l.* to the plaintiff's credit at his bankers in order to meet the cheques in question.

The difference between the plaintiff's instructions and the mode in which Thompson carried them out was practically of so little consequence to any one that their Lordships are surprised that any real importance should have been attached to this variation from the plaintiff's instructions.

The plaintiff said he knew nothing about store warrants, and asked Thompson to place 1000*l.* to his credit. Thompson agreed to do so. He made no difficulty about it; he treated the matter as an ordinary business transaction. As regards this advance Thompson represented the Frozen Meat Company, and by making the advance that company would acquire a lien or security on the plaintiff's sheep in the possession of the company. The benefit of this lien could be transferred to the bank without any instructions from the plaintiff and without his consent. As a matter of business it was quite immaterial whether Thompson advanced the plaintiff 1000*l.* and placed that sum to the plaintiff's credit with the bank, or procured the bank to place that sum to his credit without going through the form of making the advance himself and then transferring his debt and the security for it to the bank. It is true that nothing was said by or to the plaintiff about any store warrant or about Thompson obtaining an advance from the bank on the security of a store warrant. But when the plaintiff was told what had been done he was perfectly satisfied; and when asked why he did not bring an action against the Frozen Meat Company for

not advancing the 1000*l.*, his answer was because they did what was equivalent to it. This evidence proves, not that there was a ratification of an unauthorized act, but rather that what Thompson did was within the real scope of the authority originally conferred upon him by the plaintiff, which appears to their Lordships to be the real truth. It appears to their Lordships to be plain from the evidence given at the trial that it never occurred to Chisholm, nor to Thompson, nor to the plaintiff that anything could turn on the substitution of the store warrant for cash; they all treated the substitution as of no importance at all.

The following questions, however, were submitted to the jury by the judge who tried the action:—

"1. Did the plaintiff and the manager of the defendant bank agree on August 28, 1897, that the bank should honour the plaintiff's cheques up to 1200*l.*?—Yes.

"2. Was it part of the agreement that the proceeds of 2250 sheep of the plaintiff's then in the Southland Frozen Meat Company's works when sold should be paid to the defendant bank in payment or reduction of such overdraft?—No.

"3. Or were the proceeds of the said sheep, and also of some skins of the plaintiff's then at a fellmongery near Invercargill, merely mentioned by the plaintiff as the source from which he expected to pay the said overdraft?—Yes.

"4. Did the plaintiff on September 4 request Mr. Thompson to pay into his credit with the defendant bank the sum of 1000*l.* to meet certain cheques which the plaintiff had drawn to pay for sheep purchased?—Yes.

"5. Did Mr. Thompson tell Mr. Chisholm that he had been requested by plaintiff to pay 1000*l.* to plaintiff's credit at the bank to meet cheques already drawn by him to pay for sheep purchased?—Yes.

"6. Did Mr. Thompson request Mr. Chisholm to accept a store warrant for 1000*l.* worth of plaintiff's sheep instead of his paying in 1000*l.*?—Yes.

"7. Did Mr. Chisholm accept the said warrant as a consideration for honouring plaintiff's cheques beyond the limits of his overdraft?—Yes.

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"8. Did the request made by plaintiff to Mr. Thompson to pay 1000*l.* to his credit to meet the said cheques authorize Mr. Thompson to deposit a warrant for 1000*l.* worth of sheep instead of paying 1000*l.* to plaintiff's credit?—No.

"9. Did plaintiff on September 7 express his approval of Mr. Thompson's act in depositing the said warrant?—Yes.

"10. Did the bank on September 6 refuse to pay the cheques referred to in the statement of claim?—Yes.

"11. Were the 2250 sheep mentioned in the warrant sheep of the same number and value of those referred to in the conversation between the plaintiff and Mr. Chisholm on August 28?—No, not necessarily.

"12. Did the bank between the presentation of the cheques on the afternoon of September 6 and noon of September 7 make inquiries to ascertain the purpose for which the said cheques had been drawn?—No.

"13. If so, was the time taken by the bank a reasonable time? (1)

"14. Has the plaintiff suffered any, and if so what, damages by reason of the defendant bank refusing payment on the afternoon of September 6 of the cheques in the statement of claim mentioned?—Yes, 2000*l.*"

On the above findings judgment was entered for the plaintiff for 2000*l.* damages and costs. The defendants appealed and applied for a new trial. They contended that the plaintiffs had no cause of action, that evidence as to special damage had been improperly admitted, and that the damages were excessive.

In the Court of Appeal all the members of the Court agreed that evidence of special damage had been improperly admitted, and that the damages were excessive. If a new trial had been ordered, unless the plaintiff had consented to reduce the damages to, say, 500*l.*, as suggested by Denniston J., probably no further appeal would have been heard of. But the majority of the Court of Appeal went further, and held that the plaintiff had no cause of action and gave judgment for the defendants. This view is based entirely on Thompson's substitution of a store warrant for cash with the bank as above stated. Treating

(1) The answer to No. 12 made it needless to answer this question.

that deposit as unauthorized by the plaintiff, the Court held that there was no consideration for the promise by the bank to the plaintiff to pay the dishonoured cheques; and the Court further held that the ratification by the plaintiff of the unauthorized deposit was too late to avail the plaintiff.

For the reasons already given, their Lordships would not themselves have come to the conclusion that Thompson exceeded his real authority, or that the jury really meant to find that he had. Taking the eighth and ninth findings in connection with the evidence relating to them, their Lordships would not have understood the eighth finding as amounting to more than that nothing was said by the plaintiff to Thompson about depositing a store warrant. The further inference that Thompson exceeded his real authority in depositing the store warrant is no doubt consistent with the finding; but such inference does not appear to their Lordships to be warranted by the evidence, and appears to their Lordships to be opposed to it. They would not themselves have adopted the view taken by the Court of Appeal of the eighth finding, or have regarded it as meaning more than is stated above.

But even if the Court of Appeal were right in regarding the eighth finding of the jury as a finding that Thompson really did exceed his authority, and thereby expose himself and the Frozen Meat Company to actions for damages, their Lordships are not prepared to hold that apart from ratification no contract was proved between the plaintiff and the defendants entitling the plaintiff to sue them for a breach of it.

Omitting the 8th finding, it appears to their Lordships that the 4th, 5th, 6th, 7th and 10th answers by the jury contain all the elements necessary to constitute a contract between the plaintiff and the bank, and a breach of it for which the plaintiff can sue.

The authority to Thompson to obtain for the plaintiff as his principal a promise by the bank to pay the cheques is proved. The promise by the bank to Thompson as the agent, and for and on behalf of the plaintiff to pay the cheques, is also proved. The deposit by Thompson of the store warrant of the plaintiff's sheep as the consideration for that promise is also

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proved. What more is wanted? Is it consideration, or is it consideration moving from the plaintiff?

First, as to the consideration.

In *Currie* v. *Misa* (1) the question arose, whether a cheque drawn by the defendant and made payable to Lizardi & Co. was given for consideration or not, and whether the plaintiffs were holders of the cheque for value. The case is an important authority on the meaning of consideration. Lush J., in giving the judgment of the Exchequer Chamber, said (2): "a valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other: Com. Dig. Action on the case assumpsit B 1–15." This definition has been constantly accepted as correct. Their Lordships so treat it; and if correct it covers this case so far as some consideration is concerned. The deposit by Thompson of the sheep warrant with the bank conferred upon the bank some right, interest, profit, or benefit, which is all that is required by the first half of the definition to constitute a consideration for the bank's promise to Thompson as agent for the plaintiff to pay the cheques which he had drawn and were outstanding.

Moreover, Chisholm knew the circumstances under which the store warrant was deposited; and he was content to take it as the consideration for his promise.

Next, as to the objection that the consideration did not move from the plaintiff.

The doctrine that the consideration for a promise must move from the promisee is laid down in text-books (e.g., in Leake in his Digest of the Law of Contracts, pp. 611 and 612), and holds good in ordinary cases where a promise is made to one man for the benefit of another. But the authorities for the doctrine do not cover a case like the present, in which the consideration is supplied by an agent who obtains the promise for and on behalf of his principal. Chisholm was told that Thompson was instructed by the plaintiff to pay the bank 1000*l.*, and if he had required it that sum would have been paid accordingly;

(1) (1875) L. R. 10 Ex. 153; 1 App. Cas. 554. (2) L. R. 10 Ex. 162.

Chisholm chose with his eyes open to waive the payment in cash and to take the store warrant for what it was worth. Their Lordships are not aware of any authority for saying that in such circumstances the promisor can avoid performance of his promise to the third party on the ground that the consideration did not move from him; and to extend the doctrine to such a case would be wholly unreasonable.

The above view of the case renders it unnecessary to consider any question of ratification, or to dwell on the decision of *Bolton Partners* v. *Lambert* (1) and its application to the facts of this case. The decision referred to presents difficulties; and their Lordships reserve their liberty to reconsider it if on some future occasion it should become necessary to do so.

But although their Lordships are unable to hold that the plaintiff had no cause of action, they agree with all the members of the Court of Appeal in thinking that the learned judge who tried the case was wrong in admitting evidence of the plaintiff's loss of custom and of credit from particular individuals. The details of this misreception of evidence are given in the judgments of the Court of Appeal, and it is unnecessary to refer to them again. The damages awarded by the jury appear to their Lordships to have been exorbitant considering that the plaintiff's cheques were honoured by the bank the morning after the afternoon on which they were dishonoured. The plaintiff is, however, entitled to substantial damages, and their Lordships will adopt the views of Denniston J. that 500*l.* would be ample.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal ought to be allowed, and the judgment appealed from be reversed with costs, and that a new trial ought to be directed unless the plaintiff consents that the damages shall be reduced to 500*l.*, and that, in the event of his so consenting, he ought to be entitled to judgment for 500*l.* and to the costs of the action. The respondents will pay the costs of this appeal in either event.

Solicitors for appellant: *Ford, Lloyd, Bartlett & Michelmore.*
Solicitors for respondents: *Paines, Blyth & Huxtable.*

(1) 41 Ch. D. 295.

Referred to. INTERNATIONAL HARVESTER CO. OF CANADA *v.* PROVINCIAL TAX COMMISSIONER. [1949] A. C. 36

[PRIVY COUNCIL.]

J. C.* 1900 *May* 29; *June* 27.

COMMISSIONERS OF TAXATION . . APPELLANTS;

AND

KIRK . . . . . RESPONDENT.

(TWO APPEALS.)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Income Tax Act, 1895, *s.* 15, *sub-ss.* 3, 4—*Assessment—Income from Ore produced in New South Wales and sold outside it.*

Where income was in part derived from the extraction of ore from the soil of New South Wales Colony, and from the conversion in the latter Colony of the crude ore into a merchantable product:—

Held, that this income was assessable under the New South Wales Land and Income Tax Assessment Act of 1895, s. 15, sub-ss. 3, 4, notwithstanding that the finished products were sold exclusively outside the Colony.

In re Tindal, (1897) 18 N. S. W. L. R. 378, overruled.

APPEALS from two judgments of the Supreme Court (Dec. 13, 1898) on special cases stated. The respondent is the public officer of the Broken Hill Proprietary Company, Limited, and of the Broken Hill Proprietary Block 10 Company, Limited, for the purpose of the Land and Income Tax Assessment Act of 1895, under s. 45 of which the special cases were stated by the Court of Review.

The question in both cases, being the first stated in the special case, was whether the companies had any income in 1897 within the meaning of the Act. The material sections are set out in their Lordships' judgment. In both cases the respondent appealed to the Court of Review against an assessment by the appellants for 1898 in respect of income for the preceding year; and contended that they had no income liable for taxation, relying on *In re Tindal*. (1)

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

(1) 18 N. S. W. L. R. 378.

The Court of Review allowed the appeals, stating a special case for the Supreme Court, which in its judgment thereon followed *In re Tindal* (1), and held that the companies had no assessable income.

Asquith, Q.C., V. Hawkins, and *Butterworth,* for the appellants, contended that *In re Tindal* (1) was wrongly decided, and that the judgment in this should be reversed. Income arising from the working of a mine in New South Wales is not income earned outside the Colony within the meaning of s. 27, sub-s. 3. At any rate it is not wholly so earned, and therefore does not gain immunity under that sub-section. Webster's Dictionary, vo. "earned," was referred to. Then, with regard to s. 15, sub-ss. 1, 3, it was contended that the getting, winning, extracting, and producing mineral substances in New South Wales, and the exporting them from that Colony is the carrying on of a trade or business in the Colony within the meaning of sub-s. 1. In that view the proceeds received by the company (after making proper deductions and allowances) are income earned in the Colony. At any rate, so much of such proceeds as is attributable to the value of the substances and products exported are income so earned. In another view they are income derived from Crown lands of the Colony within sub-s. 3, for the mineral substances are gotten from the company's leasehold Crown lands; and such income is earned in the Colony. Again, it is income arising from a source in New South Wales within the meaning of s. 15, sub-s. 4.

Sir E. Clarke, Q.C., and *Danckwerts,* for the respondent, contended that the judgments of the Supreme Court herein and also in *In re Tindal* (1) were right. The companies were registered and established in Victoria. Their affairs were managed by a principal board of directors sitting at Melbourne and a subordinate board in London. They obtained their ore no doubt in New South Wales, and treated their ores wholly or in part in that Colony. In the first case the whole of the ore so treated, in the second the whole except a very small proportion, is sold outside the Colony by the Melbourne board or under their

(1) 18 N. S. W. L. R. 378.

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instructions. The profits of the companies are derived from these sales. If some of their transactions take place in the Colony they carry on their business within the meaning of s. 15, sub-s. 1, outside that Colony. The income is derived from the sales—that is, from the business carried on outside the Colony; and s. 27, sub-s. 3, on its true construction exempts income which is earned wholly or partly outside the Colony. To be assessable under the Act the income must wholly accrue within the Colony. Reference was made to *Grainger* v. *Gough*. (1)

Counsel for appellants were not heard in reply.

1900 *June* 27.

The judgment of their Lordships was delivered by

LORD DAVEY. The question in these two appeals is the same, namely, whether the companies respectively had any income in 1897 within the meaning and operation of the New South Wales Land and Income Tax Assessment Act of 1895, and liable to taxation under the provisions of that Act and the Income Tax Joint Act of 1895. In each case the company is a joint stock company formed and incorporated in accordance with the law of the Colony of Victoria, and having its head office with a board of directors at Melbourne in that Colony. Each company carries on "the business of mining" on leasehold lands held from the Crown at Broken Hill in the Colony of New South Wales, where the company has an office and a manager of the mine. A certain portion of the crude ore was in 1897 sold in that state, but the greater part was treated by the company's concentrating plant at Broken Hill. In the case of the Broken Hill Proprietary Company a certain portion was treated at the company's works at Port Pirie in South Australia. Neither company made any contracts for sale in New South Wales. The sales of the Block 10 Company were made in Melbourne except as to 1031 tons of tailings consigned to Europe. The sales of the Broken Hill Company's products were made and the purchase-money was received either in London or in Melbourne. Both companies made net profits to a large amount from these business operations. There is no

(1) [1896] A. C. 325.

material distinction between the two cases. The decision of the Supreme Court in each case followed a previous decision of the same Court in *In re Tindal*. (1)

The following are the material provisions of the Land and Income Tax Assessment Act of 1895 :—

" Sect. 15. Subject to the provisions of this Act and the regulations hereunder there shall be charged, levied, collected and paid to the Commissioners for the use of Her Majesty an income tax at such rate per pound as Parliament shall from time to time declare and enact in respect of the annual amount of all incomes exceeding 200*l*. per annum.

" (1.) Arising or accruing to any person wheresoever residing from any profession, trade, employment or vocation carried on in New South Wales, whether the same be carried on by such person or on his behalf wholly or in part by any other person."

" (3.) Derived from lands of the Crown held under lease or licence issued by or on behalf of the Crown.

" (4.) Arising or accruing to any person wheresoever residing from any kind of property except from land subject to land tax as hereinafter specifically excepted, or from any other source whatsoever in New South Wales not included in the preceding sub-sections."

" Sect. 27.—(3.) No tax shall be payable in respect of income earned outside the Colony of New South Wales.

" Sect. 28. From the taxable amount so ascertained as aforesaid every taxpayer shall be entitled to deductions in respect of the annual amount of (inter alia) :

" (1.) Losses, outgoings, including interest and expenses actually incurred in New South Wales by the taxpayer in the production of his income."

" (5.) Notwithstanding the limitation in sub-s. 1 hereof the Commissioners shall in cases where it may seem to them just allow losses, outgoings, and expenses even if incurred beyond the Colony."

The case may be stripped of some irrelevant details which have been imported into it. It is wholly immaterial whether the person to be taxed resides in the Colony or not. The case

(1) 18 N. S. W. L. R. 378.

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would be precisely the same if these companies were New South Wales companies having their head offices in the Colony. Nor is it material whether the income is received in the Colony or not if it is earned outside the Colony. The Supreme Court have thought in *Tindal's Case* (1) and in these cases that the income was not earned in New South Wales because the finished products were sold exclusively outside the Colony.

The real question, therefore, seems to be whether any part of these profits were earned or (to use another word also used in the Act) produced in the Colony. This is a question of fact.

At first sight it seems startling that the ultimate result in the form of profit of a business carried on (as found by the special cases) in the Colony is not to some extent taxable income there, but if it cannot be brought within the language of the Act that must of course be the result. Their Lordships turn to the construction of the Act. The word "trade" no doubt primarily means traffic by way of sale or exchange or commercial dealing, but may have a larger meaning so as to include manufactures. But if you confine trade to its literal meaning, one may ask why is not this income derived (mediately or immediately) from lands of the Crown held on lease under s. 15, sub-s. 3, or from some other source in New South Wales under sub-s. 4. Their Lordships attach no special meaning to the word "derived," which they treat as synonymous with arising or accruing. It appears to their Lordships that there are four processes in the earning or production of this income—(1.) the extraction of the ore from the soil; (2.) the conversion of the crude ore into a merchantable product, which is a manufacturing process; (3.) the sale of the merchantable product; (4) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages. The first process seems to their Lordships clearly within sub-s. 3, and the second or manufacturing process, if not within the meaning of "trade" in

(1) 18 N. S. W. L. R. 378.

sub-s. 1, is certainly included in the words "any other source whatever" in sub-s. 4.

So far as relates to these two processes, therefore, their Lordships think that the income was earned and arising and accruing in New South Wales. They exclude from consideration for the purpose of simplicity the treatment in Port Pirie. This point was, if possible, more plainly brought out in *Tindal's Case.* (1) The Station Department of Tindal's business was there treated as a separate business yielding an assessable income. It is difficult to see why any more than in this case, as the mere keeping of separate books containing cross entries of debit and credit between the two departments was a mere matter of convenience, and could make no difference in substance. The question in that case, as here, should have been what income was arising or accruing to Tindal from the business operations carried on by him in the Colony.

The fallacy of the judgment of the Supreme Court in this and in *Tindal's Case* (1) is in leaving out of sight the initial stages, and fastening their attention exclusively on the final stage in the production of the income. The learned judges refer to some English decisions on the Income Tax Acts of this country, which in language, and to some extent in aim, differ from the Acts now before their Lordships. The language used in the English judgments must of course be understood with reference to the cases then under consideration. In *Sulley* v. *Attorney-General* (2) and in *Grainger & Son* v. *Gough* (3) the question was whether the person sought to be charged was exercising a trade in this country within the meaning of the Acts. In the former case it was decided that the mere purchase of goods in this country for the purpose of enabling a person to trade in America did not constitute the exercise of a trade here. While in *Grainger & Son* v. *Gough* (3) it was held on the facts there found that the sale by a French firm in France to English customers did not constitute the exercise of a trade in England. In such cases the place where the profits come home to the trader may be a very good test of the place where

(1) 18 N. S. W. L. R. 378. (2) (1860) 5 H. & N. 711.
(3) [1896] A. C. 325.

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the trade is carried on. But these cases do not appear to their Lordships to have much to do with a case such as the one before them, where a business is admittedly carried on in this country. In *San Paulo Ry. Co.* v. *Carter* (1), all that the House of Lords had to decide was whether a company with a head office in London, from which the board of directors governed the operations of the company in Brazil, did not exercise a business in England. It would have been difficult to say in that case that the profits or income were not to some extent, at any rate, earned in Brazil.

Their Lordships are, therefore, of opinion that the first question stated in the special case on each of these appeals should have been answered in the affirmative, and that is all they are called upon to say. They will accordingly humbly advise Her Majesty that the two orders of December 13, 1898, respectively be reversed, and instead thereof it be ordered that the appeal of the Commissioners be allowed, and the first question in the special cases be answered in the affirmative, and a declaration be made accordingly, and that the present respondent in each appeal shall pay the costs of the present appellants in the Court of Review and in the Supreme Court. The respondents will also pay the cost of these appeals.

Solicitors for appellants: *Light & Galbraith.*
Solicitors for respondent: *Burton, Yeates & Hart.*

(1) [1896] A. C. 31.

[PRIVY COUNCIL.]

MONTREAL GAS COMPANY . . . . DEFENDANTS; J. C.*

AND 1900

VASEY . . . . . PLAINTIFF. *July* 11, 12, 28.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Contract—Construction—Conditional Promise to favourably consider a Proposal.

Held, reversing the judgment of the Courts below, that a written promise by the appellants that if satisfied with the respondent as a customer they would favourably consider any application by him to renew a subsisting contract between them on its expiration does not impose a legal obligation to grant it.

APPEAL from a decree of the above Court (Dec. 29, 1898).

The Superior Court for Lower Canada (Mathieu J.) had, on February 5, 1898, decreed payment by the appellants of $14,113 damages for breach of contract, after deducting $1686 claimed by the appellants in a cross-demand and admitted by the respondent. Cross-appeals having been brought, the Appeal Court held the amount of damages awarded to be the minimum which could have been assessed on the evidence, but they refused to increase it except to the extent of allowing interest from the date of service of the action.

The question decided in appeal was whether there was any valid contract at all. That depended upon the construction of the letter of December 20, 1886, set out in their Lordships' judgment, in which the appellants conditionally promised to favourably consider an application by the respondent; whether this promise imported a legal obligation to grant the application, and liability to damages if they refused it.

Mathieu J. was of opinion that the condition of the letter as to satisfaction was not one dependent on the will purely of

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY STRONG.

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the company; and that Vasey was a good customer; and that the company were satisfied with him; and that consequently they were bound to accede to his application. He was further of opinion that a renewal for at least two years was in contemplation when the letter was signed; and that damages should be assessed on the basis of a right to renewal for two years. He found that a breach had been committed by non-renewal, and on this basis assessed the damages at $10,000.

In appeal, a majority of the Appeal Court (Lacoste C.J. dissenting) affirmed this construction. They relied on art. 1014 of the Civil Code of Lower Canada.

Blake, Q.C., and *Brosseau, Q.C.*, for the appellants, contended that the letter in question did not amount to a contract. The company retained a right to say whether they were satisfied with the respondent or not. They were entitled to take his application into consideration, which implies a right to decide according to their own views and interests when the time comes for doing so; there was no period of renewal stipulated, nor any other specific terms and conditions specified. The company bound themselves to nothing, but reserved full exercise of their discretion. Art. 1014 does not bear out the decision of the Court. It merely provides, where alternative constructions are possible, which should be preferred. It does not say that expressions of favourable intention should be enlarged so as to form a binding contract. See *Price* v. *Assheton.* (1)

Lawson Walton, Q.C., and *R. C. Smith, Q.C.*, for the respondent, contended that the Courts below were right. The letter in question must be interpreted in the light of the surrounding facts as established or to be inferred from the evidence. To "favourably consider" means, having regard to the surrounding facts, to grant an application. The letter amounted to a memorandum of extension subject to one condition—that the appellants should be satisfied with the respondent as a customer. The evidence was conclusive, and the Courts found that the respondent was satisfactory as a

(1) (1835) 1 Y. & C. Ex. 441; 41 R. R. 222.

customer. As the condition happened, the appellants were bound to renew. See art. 1081 of the Civil Code and art. 1174 of Code Napoleon.

The appellants were not heard in reply.

July 28. The judgment of their Lordships was delivered by

SIR HENRY STRONG. On December 15, 1886, the appellants entered into a contract with the respondent for the sale to him of ammoniacal liquor produced by them in their manufacture of gas, by the terms of which the appellants agreed to deliver to the respondent during a period of five years from May 1, 1887, all the ammoniacal liquor they should manufacture at their works. And the respondent agreed to pay for the same 1*l.* for every ton of sulphate of ammonia he should manufacture from such liquor so long as the net price in London should exceed 9*l.* 10*s.* per ton. The appellants also agreed to supply the respondent during the same term with all their spent oxide of iron free of charge. The agreement contained numerous promises of a special character which are not now material to be mentioned.

On December 20, 1886, five days after the execution of the contract, the president of the company wrote to the respondent the following letter :—

"Thomas E. Vasey, Esq. "Montreal,
"Dear Sir, "20th December, 1886.

"Referring to the contract made with you on the 15th instant for the sale of ammoniacal liquor, I may say that, if we are satisfied with you as a customer, we would favourably consider an application from you at the expiration of the term for a renewal of the same for another period.

"Yours truly,
"(Signed) Jessie Joseph."

At the expiration of the contract of December 15 the appellants refused the respondent's application for a renewal.

The respondent thereupon brought his action against the appellants, seeking to recover damages for alleged breaches of the contract of December 15, 1886, and also for the refusal to

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renew the original contract, which, as the respondent alleged, they were bound to do according to the terms of the letter of December 20.

The appellants having filed an incidental demand claiming damages for breaches of the original agreement by the respondent, the parties went to enquête and hearing.

Mathieu J., before whom the cause was heard, awarded damages to the respondent for the non-fulfilment in several particulars of the original agreement, and also for the non-renewal of the contract in accordance with the obligation to do so, which he held to be contained in the letter of December 20, and in respect of this latter breach of contract the learned judge condemned the appellants in damages to the amount of $10,000, with interest from the date of the judgment. The respondent's right to recover for the non-performance of a contract supposed to be contained in the letter being, together with a question of interest hereafter referred to, the only questions involved in this appeal, the other subjects of contention in the action are now immaterial and need not be further referred to. The judgment thus rendered in favour of the respondent having been made the subject of an appeal to the Court of Queen's Bench, and the respondent having also instituted a cross-appeal, these appeals were heard together, and judgment was thereupon rendered maintaining the first judgment as regards the damages for breach of the contract held to be contained in the letter, but allowing the appeal and altering the judgment of Mathieu J. on the question of interest by allowing interest, not only upon the $10,000 in question, but also upon the other items of damages awarded to the respondent from the date of the commencement of the action instead of from the date of the judgment.

The present appeal is from the judgment of the Court of Queen's Bench just mentioned.

The appellants insist that the letter of December 20, 1886, does not contain any contract or agreement susceptible of legal enforcement, and that the judgments of the Courts below, which treat it as imposing a legal obligation upon the appellants, are erroneous.

This was the conclusion of the learned Chief Justice in the Court of Queen's Bench, who dissented from the judgment of the Court.

Their Lordships are of opinion that the oral evidence admitted on the enquête was improperly received. The letter must speak for itself: if there was a contract to renew, its terms must be found in the writing. Their Lordships are unable to find in the promise made in this letter that the appellants would "favourably consider" an application to renew anything legally binding the appellants; so far from this being so, the terms used imply that the appellants reserved to themselves the right to deliberate on the question of renewing the contract if the respondent should apply to them to do so. The utmost that can be said is that the respondent, if he proved to be satisfactory as a customer, might, as the letter assures him, expect favourable consideration. It does not require demonstration to shew that such an undertaking falls short of contract.

The appeal must, therefore, succeed so far as it is sought to have the damages, amounting to $10,000 for non-renewal and the interest on those damages, disallowed.

As regards the alteration made by the Court of Queen's Bench in the original judgment in the matter of interest on the damages not in question on this appeal, their Lordships are unable to see that this alteration was erroneous.

The learned Chief Justice considered that the first judgment must be taken to include interest in the damages awarded up to the date of the judgment; this, however, does not appear to have been done, and, in the absence of any evidence that it was so comprised, their Lordships think they must treat interest from the date of the action as not included in the damages. Then, as it appears that the respondent was entitled to recover interest from the date the appellants were put "en demeure" by the service of process, the judgment of the Court of Queen's Bench in this respect must be considered not to have been successfully impeached.

Their Lordships will humbly advise Her Majesty to allow the appeal by discharging so much of the judgment as awards $10,000 for damages for not renewing the contract and allows

J. C. 1900 MONTREAL GAS COMPANY v. VASEY.

interest thereon, and by so varying it as to award no costs to either party in the Court of Queen's Bench. There will be no costs of the present appeal.

Solicitor for appellants: *S. V. Blake.*
Solicitors for respondent: *Ingle, Holmes & Sons.*

[PRIVY COUNCIL.]

J. C.* 1899 *July* 20, 28.

LA BANQUE D'HOCHELAGA . . . . APPELLANTS;

AND

STEVENSON, ÈS QUALITÉ . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC (APPEAL SIDE).

Civil Code of Lower Canada, arts. 2013 *G and* 2103—59 *Vict. c.* 42—*Builder's Privilege—Hypothecary Privilege.*

Held, that under the Civil Code, as amended by 59 Vict. c. 42, a builder's privilege is limited to one year from the date of registration thereof; and, with regard to an hypothecary privilege conferred on suppliers of materials, it only arises on notice being given to the proprietor under art. 2013 G, and registered under art. 2103, and lapses unless the prescribed legal proceedings are taken within three months from the date of notice.

APPEAL from a decree of the above Court (Oct. 28, 1899) affirming a decree of the Superior Court at Montreal (June 27, 1898).

The Courts below maintained the contestation made by the curator of an insolvent estate against a creditor who sought to be paid by special privilege and by preference over other creditors out of the proceeds of an insolvent's real estate.

It appeared that Lefebvre was an insolvent trader of Montreal; that on August 17, 1897, a few days after the insolvency, the respondent was appointed curator to the insolvent estate; that the appellant bank was collocated as

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY STRONG.

cessionaire (transferees) in right of the firm of Corbeil & Léveillé, who had on March 16, 1896, registered against the insolvent's property their claim for works performed and materials supplied for buildings erected on the property since September 9, 1895.

The respondent contested the collocation made in favour of the appellant, on the ground that more than a year had elapsed since registration without any legal procedure being taken. The appellant denied that the prescription was limited to one year, alleged that a longer delay had been stipulated for and agreed upon between the firm and the insolvent, and claimed that the registered privilege had become an hypothecary privilege on the property.

The statute 59 Vict. c. 42 came into force on February 21, 1896, three days after the complete supply of materials and completion of the work, but before registration of the memorial of privilege on March 16, 1896.

The decision of the Courts below was that Act 59 Vict. c. 42 governed the claim of builder's privilege, since the memorial had been registered when that Act was in force; and that with regard to the hypothecary privilege, the necessary conditions had not been complied with.

Haldane, Q.C., and *Brosseau, Q.C.*, for the appellant bank, claiming as transferees of the rights of Corbeil & Léveillé, contended that, the firm's work having been done and the firm having supplied materials before 59 Vict. c. 42 came into force, their privilege was to be governed by the Act then in force, namely, 57 Vict. c. 46, which had conferred a privilege for two years from the date of its registration. If 59 Vict. c. 42 applied, which reduced the privilege to one year's duration, then the parties, namely, the firm and the insolvent, had themselves stipulated for a three years' delay, and the privilege stood valid till its expiration. Under the later Act the firm acquired an hypothecary privilege for the materials supplied. The materials having been supplied directly to the proprietor of the realty, and the contracts made with him, no notice of contract was required to be given to him before delivery.

J. C. 1900 LA BANQUE D'HOCHELAGA v. STEVENSON.

According to arts. 2013 G, J, and L, and art. 2103 of 59 Vict. c. 42, the firm, as suppliers of materials, in order to acquire an hypothecary privilege had only to register a memorial drawn up according to Form A attached to art. 2103.

Geoffrion, Q.C., for the respondent, was not heard.

1900 *July* 28.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In the distribution of the estate of one Lefebvre, an insolvent proprietor, the appellants, the Bank of Hochelaga, in right of a firm of builders and suppliers of materials, claim priority over the insolvent's general creditors. Their claim is put in two ways. They rely, in the first place, on the transfer of a builder's privilege registered against the insolvent's immovables. In the event of that claim failing, they fall back on the hypothecary privilege conferred on suppliers of materials by the articles of the Civil Code now in force.

In order to make good their claim, the bank must shew that the privilege claimed, whether it be the builder's privilege or the hypothecary privilege, was in existence at the commencement of the insolvency. The insolvency in the present case occurred within the period of two years, but after the expiration of one year from the date of registration.

The original claim on the part of the bank was under the builder's privilege. The claim to an hypothecary privilege was put forward in the course of the litigation. The Superior Court refused to allow an amendment proposed to be made in order to bring this claim upon the record. But the claim to an hypothecary privilege as well as the claim to the builder's privilege was considered and rejected both by the Superior Court and by the Court of Queen's Bench on appeal. Their Lordships entirely concur in the judgment of the Court of Queen's Bench delivered by Lacoste C.J., who adopted the reasoning of the Superior Court.

The original claim was founded on the articles of the Civil Code as amended by 57 Vict. c. 46. That statute, which came into force in March, 1894, gave a right of preference to the supplier of materials as well as to the builder, and conferred a privilege for two years from the date of registration. It was,

however, repealed by 59 Vict. c. 42, which came into force on February 21, 1896. The latter statute omitted suppliers of materials from the list of privileged creditors, and reduced the builder's privilege to the period of one year from the date of registration, but it gave the supplier of materials, on compliance with certain formalities, an hypothecary privilege.

In the present case the work was done and the materials supplied while the Act of 57 Vict. was in force. But the required memorial or bordereau was not registered until March 16, 1896, and it is to be observed that the amount mentioned in the memorial was a lump sum. The memorial does not distinguish between the amount due for work done and the amount due for materials supplied.

The bank claims that, inasmuch as the work was done and the materials supplied while the earlier Act was in force, the privilege must be deemed to last for two years. But, obviously, this is not the case. When the memorial was registered, the only articles under which registration could be effected were the articles of the Code as amended by the Act of 59 Vict. Registration under those articles confers a privilege, but a privilege limited to one year from the date of registration.

The claim to an hypothecary privilege under the Act 59 Vict. seems to be equally without foundation. It is not alleged that the claimants did in fact comply with the formalities required by the articles of the Civil Code as amended by the Act of 59 Vict. They seek to rely upon an admission made in the course of the proceedings to the effect that all the formalities required were complied with. But this admission was made when the only question between the parties was as to the duration of the builder's privilege. No claim to an hypothecary privilege had been advanced at that time. In the next place they say that it was impossible for them to comply with the prescribed formalities because the materials were supplied directly to the proprietor. Whatever the reason for non-compliance may have been, art. 2013 L, introduced by the Act 59 Vict., makes it perfectly clear that the hypothecary privilege conferred on suppliers of materials only arises on notice being given to the proprietor in virtue of art. 2013 G and registered

J. C. 1900 'La Banque d'Hochelaga v. Stevenson.

according to art. 2103. It lapses unless the prescribed legal proceedings are taken within three months from the date of the notice. The claim of the bank, therefore, fails, and their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants: *Simpson & Co.*
Solicitor for respondent: *S. V. Blake.*

[PRIVY COUNCIL.]

J. C.* 1900 *May* 25, 26; *June* 19; *July* 11.

ALLAN . . . . . PLAINTIFF;

AND

MORRISON AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Lost Will—Evidence—Presumption that it was Destroyed by Testator—Presumption against Fraudulent Abstraction.

Where a will duly executed, traced to the testator's possession and last seen there, is not forthcoming on his death, the presumption is that it was destroyed by himself. To rebut it there must be sufficient evidence that it was not destroyed by the testator animo revocandi; and *held* in this case that concurrent findings that it had not been rebutted could not be disturbed. There is a presumption against its fraudulent abstraction either before or after his death, but the circumstances which render such abstraction possible must be taken into account in arriving at the result of the evidence.

APPEAL from a decree of the Court of Appeal (May 25, 1899) affirming a decree of Denniston J. (April 11, 1899) in the Supreme Court of New Zealand, in the District of Canterbury.

The plaintiff, as the executor of Morrison's will, dated March 22, 1893, propounded the draft of the will, and claimed that probate in solemn form should be granted to him until the original will should be found and brought into the proper

* *Present:* LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, SIR HENRY DE VILLIERS, and SIR FORD NORTH.

office of the Court. The defendants were the widow Lavinia Morrison (the respondent) and the next of kin of the testator. Only the respondent defended the action.

It was admitted that the will had been duly executed, but it could not be found after the death of the testator by those who searched for it on behalf of the plaintiff, and it was not produced. The plaintiff alleged that it never was revoked or destroyed by the testator, and that it was at the time of his death a valid and subsisting will, and the last will and testament of the deceased; and he tendered for probate what was proved and admitted to be a correct draft of it. The respondent alleged that the said will had been revoked by the testator.

Both Courts held that the onus was upon the appellant to rebut the presumption of law which arose under the circumstances stated in their Lordships' judgment that the will was destroyed by the testator animo revocandi, and found that the evidence failed to discharge it.

Deane, Q.C., and *Northcote*, for the appellant, contended that the Courts below had taken an erroneous view as to the onus probandi. Under the Wills Act, if the will is proved to have been duly executed and cannot be found, the onus is on those who allege that it has been destroyed animo revocandi. The evidence in this case was quite insufficient to rebut the presumption of law that a will having been duly executed has not been revoked; and the evidence in fact did not suffice to prove that it had ceased to be in existence at the time of the testator's death. With regard to the view adopted by the Courts below, it was contended that no presumption of destruction animo revocandi arose simply because a duly executed will is not forthcoming at the testator's death. To raise such a presumption it must be shewn that the same was in the actual and exclusive possession of the testator, and in such circumstances as to render it reasonably probable that he could personally obtain and destroy it. It was contended that the evidence in this case did not establish but, on the contrary, disposed of the existence of a reasonable probability to that effect. It shewed that the will was not in the actual

J. C. 1900 ALLAN v. MORRISON.

and exclusive possession of the testator, but was accessible to other persons, some of whom were interested in thwarting the testator's testamentary intentions. But whatever presumption of law might arise, that the testator did not intentionally destroy the will was completely rebutted by the evidence which it was contended when closely examined was sufficient to lead to a moral conviction that he did not so destroy it even if it failed to exclude every possibility of his having done so. It was further urged that the testator's conduct with regard to his testamentary intentions was inconsistent with his having wilfully destroyed his will, and that it was incredible that if he had done so he should have concealed it. Reference was made to *Harris* v. *Berrall* (1), *Finch* v. *Finch* (2), *Sprigge* v. *Sprigge* (3), *Podmore* v. *Whatton* (4), *Benson* v. *Benson* (5), *Sugden* v. *Lord St. Leonards* (6), to the judgment of Cockburn C.J. therein, and to a dictum of Lord Campbell (p. 220) cited from 8 E. & B.

Sir R. T. Reid, Q.C., and *Priestley*, for the respondent Lavinia Morrison, were not heard.

1900 July 11.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal from a judgment of the Court of Appeal of New Zealand dated May 25, 1899, affirming the judgment of Denniston J. dated April 11, 1899, whereby the plaintiff's action was dismissed.

The plaintiff and present appellant sued as the executor of the last will, dated March 22, 1893, of one Strong Work Morrison, who died at Timaru on February 5, 1897. By his statement of claim the appellant propounded the draft of the will in question, and claimed probate in solemn form until the original will should be found. The first defendant and respondent was the widow of the deceased, and she alone defended the action. By the statement of defence she admitted the execution of the said will, but alleged that it was revoked

(1) (1858) 1 Sw. & Tr. 153.
(2) (1867) L. R. 1 P. & M. 371.
(3) (1868) L. R. 1 P. & M. 608.
(4) (1864) 3 Sw. & Tr. 449.
(5) (1870) L. R. 2 P. & M. 172, 176.
(6) (1876) 1 P. D. 154, 175, 202, 220.

by the testator. The other defendants and respondents were the next of kin. They did not put in any statements of defence or defend the action, and they do not appear on this appeal.

For the purpose of this judgment a short outline of the facts of the case will suffice. The testator was a native of Shetland. He had emigrated to the Colony many years ago and had amassed a small fortune, which was stated at the trial to amount in value to about 11,000*l.* It was chiefly invested in mortgages on land. He maintained friendly relations with his relatives in Shetland and elsewhere who were in poor circumstances, and a brother and sister in Shetland had been assisted by him up to a short time before his death. One nephew, James Morrison, he had brought with him to New Zealand when a boy of about eight or nine years of age after a visit by the testator to Scotland. He appears to have been much attached to this nephew. The testator's brother-in-law, James Laurenson, with his five children, had also emigrated to the Colony at the testator's suggestion.

The testator was only once married, namely, in the year 1844 to the respondent Lavinia Morrison, and there was no issue of his marriage. The respondent was at the time of her marriage to the testator a widow with three children. Her daughters, Emma Jane Hudson and Alice Maud Mary Hudson, lived with the testator and his wife. On his marriage the testator settled a sum of 1200*l.* upon his wife for her life or widowhood, and afterwards in trust for himself and his executors, &c. This sum seems to have been lost, or was supposed to be lost, through the bankruptcy of the trustee in 1892, and the testator thereupon resettled 1150*l.* in trust for his wife during her life or widowhood, and subject thereto for her three children in equal shares.

On March 22, 1893, the testator made the will in question. He thereby gave the use of his freehold house to his wife during her life or widowhood, and his furniture and articles of domestic use to her absolutely, and he gave a small section of land with a cottage to his nephew James Morrison. He also gave his wife the income of 1800*l.* during widowhood, and gave various legacies to members of his family, including 100*l.* to each of

J. C. 1900 ALLAN v. MORRISON.

his step-daughters, and 600*l.* to his nephew James Morrison, and gave the residue to his wife and surviving nephews and nieces. Altogether it appears to have been such a will as a man in the testator's circumstances might have been expected to make.

From the month of October, 1893, the testator was a confirmed invalid. His eyesight was weak, and he suffered from palsy. He could not feed himself or get into or out of his bed without assistance. His step-daughter, Miss Emma Jane Hudson, principally attended to him with occasional assistance from her sister. He was, however, able to leave his room, and he appears to have usually sat up in an armchair in his dining-room. In this room there was an iron safe which contained three tin boxes. The testator in 1894 or 1895 sent for his will, and in Miss Emma Hudson's presence placed it in one of these boxes in a sealed envelope. This seems to have been the last time it was seen. After his death the envelope was found in the tin box with some deeds, but the will had disappeared. The testator kept the keys of the safe and tin box on one bunch in his own possession. When he was in bed they were in the pocket of his trousers hanging by his bedside. When the testator required to go to the safe Miss Emma Hudson usually unlocked it for him "as it was such an exertion for him." But he appears from her evidence to have been able to unlock and lock the tin boxes for himself, and to have been in the habit of doing so. In the afternoon of January 21, 1897, the whole family were absent attending some fête, and the testator was left alone in the house with a little servant girl named Annie Allen. The testator was in the dining-room. By his direction Annie Allen unlocked the safe and left the room. He called her in again, and she then by his direction shut the safe. Miss Emma Hudson says he always had a fire burning in the dining-room. On Saturday January 23 he became much worse, and sent two several messages for Mr. Perry, his lawyer; but when he came on the following Monday the testator was too ill or unwilling to talk to him on business.

Evidence was given at the trial by the respondent Mrs. Morrison and her daughters, and various members of the

Laurenson family, and by the testator's doctor, his lawyer, and the minister of his church and others. This evidence is very fully discussed in the judgment of Denniston J. and in that of the Court of Appeal, and their Lordships do not think it necessary for them to discuss it further, or to notice the various details which are spoken to by the witnesses. Denniston J. sums up his judgment in these words :—

"The result in my mind of a consideration of all the evidence is that, while, as I have said, there were grounds for a strong presumption that the will would have been found existing at the testator's death, I am not (to use the words of one of the judgments cited) morally convinced that the will was not destroyed by the testator animo cancellandi. That being so, the presumption arising from the fact of its being traced to the testator's possession and its non-production at his death that it was so destroyed has not been rebutted."

The Court of Appeal say :—

"The hypothesis of accidental loss or destruction is unreasonable. There is a presumption against the hypothesis of fraudulent abstraction. There is a reasonable possibility that the deceased destroyed the will himself. In order to find for the will we must be morally satisfied that it was not destroyed by the testator animo revocandi. We are not so satisfied."

We have thus concurrent judgments of the two Courts below on what is after all a question of fact. It is not the practice of this Board to review concurrent findings of fact, though it may of course be done in exceptional circumstances. But Mr. Bargrave Deane, on behalf of the appellant, argued that the Courts below had approached the consideration of the case from a wrong point of view. He contended, first, that the testator had not the actual custody of the will at all, and furthermore, that there was no proof that the will was not in existence at the time of his death, and therefore the presumption that he had destroyed it himself never arose. He further contended that the learned judges had mistaken and exaggerated the weight of the presumption. The learned counsel's first argument is based on the admitted fact that Miss Emma Hudson used to be entrusted with the testator's keys for the

J. C. 1900 ALLAN v. MORRISON.

purpose of opening the safe and bringing one of his tin boxes to him, if he required it, in his bedroom, and on the suggestion that the keys might have been abstracted from the pocket of his trousers either while he slept, or during the stupor in which he lay during some hours preceding his death, or (of course) after his death. Their Lordships agree with the Court of Appeal that this contention cannot be supported. The will was in the testator's repository, the keys of which were in his possession, and no access could be obtained to it without either his permission or a fraudulent abstraction of his keys. No doubt the circumstances relied on by the learned counsel are legitimate matter for consideration in weighing the evidence adduced for the purpose of rebutting the presumption relied on in the Courts below, but they do not prevent the presumption arising. Their Lordships hold that the will was in the testator's custody when last seen. Of course it was not proved not to be in existence at the moment of his death, and it is very rarely that such evidence can be given. The possibility of its having been destroyed after his death is again a circumstance to be taken into account in arriving at the result of his evidence.

It was not denied that there is a presumption (to use the language of Lord Wensleydale in *Welch* v. *Phillips* (1)), "that if a will traced to the possession of the deceased and last seen there is not forthcoming on his death, it is presumed to have been destroyed by himself: and that presumption must have effect unless there is sufficient evidence to rebut it." Whether this should be called a presumption of law or fact does not seem material. It may, of course, be rebutted, and (as said by Cockburn C.J. in *Sugden* v. *Lord St. Leonards* (2)) "the presumption will be more or less strong according to the character of the custody which the testator had over the will." But it was attempted to minimise the force of the presumption, and reference was made to the cases of *Harris* v. *Berrall* (3); *Finch* v. *Finch* (4); *Sprigge* v. *Sprigge*. (5) In two of these

(1) (1836) 1 Moo. P. C. 299.
(2) 1 P. D. 154.
(3) 1 Sw. & Tr. 153.
(4) L. R. 1 P. & M. 371.
(5) L. R. 1 P. & M. 608.

cases the question was whether a will which was found mutilated at the death of the testator, who had been insane for some time prior to his death, was entitled to probate, and it was held in the affirmative, Lord Penzance holding that the ordinary presumption, which he fully recognised, did not apply to such a case. It obviously does not, as the main question in such a case is whether the mutilation (assuming it to have been made by the testator) took place before or during the insanity. In *Finch* v. *Finch* (1) the Court inferred from the facts proved that the will was in existence at the date of the testator's death. These cases have, therefore, nothing to do with the one before their Lordships.

Their Lordships are of opinion that there is no objection to the way in which the law was applied by the learned judges to the facts before them, and that their judgment was correct. Certainly there is no reason why their decision that the presumption was not rebutted should be disturbed. They will, therefore, humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of it.

Solicitors for appellant: *Longbourne, Stevens & Co.*
Solicitors for respondent: *Iliffe, Henley & Sweet.*

(1) L. R. 1 P. & M. 371.

[PRIVY COUNCIL.]

J. C.* 1900 *May* 16, 18; 24. *July* 7.

TORVA EXPLORING SYNDICATE, LIMITED . . . . . } DEFENDANTS;

AND

KELLY . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Contract — Construction — "Flotation" — British South Africa Company's Mining Ordinance, 1890, *ss.* 26, 27, 28.

Where a prospector agreed with a syndicate that his pay for services rendered in Matabeleland or Mashonaland should be 250*l.* on flotation by the syndicate of every block of ten claims pegged by him, and the syndicate agreed to sell 330 claims pegged by the prospector to a substantial company which had for one of its principal objects the developing and working of gold mines:—

Held, that this was a flotation of the claims within the meaning of the agreement, and that the provisions of the Mining Regulations of 1890, ss. 26, 27, and 28, were not imported into the agreement so as to limit the meaning of flotation to one by the British South Africa Company or by the claimholder with their consent, in either case after the grant of an inspection certificate.

APPEAL from a decree of the Supreme Court (May 20, 1898) affirming a decree of the High Court of Matabeleland, and ordering the appellants to pay to the respondent 8250*l.* with interest and costs.

The question decided was as to the meaning of the word "flotation" in the agreement dated July 17, 1894, set out in their Lordships' judgment. The respondent's suit to recover under his contract was founded on his contention that the formation of the Charterland Goldfields Company and its purchase of the 330 claims pegged by him amounted to a flotation thereof within the meaning of his contract, or alternatively that the appellants were bound thereby to float the said claims within a reasonable time, and by divesting them-

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

selves of all control over the said claims had precluded themselves from doing so. The appellants denied both contentions.

Vincent J. decided in favour of the respondent, holding that the term "flotation," with regard to mining claims, might, speaking broadly and generally, be taken to mean the selling to the public, whether by means of a pool or otherwise, of such claims, the vendor to receive scrip or cash; and, applying this definition to the case before him, he considered that there had been a flotation of the claims pegged by the respondent.

In appeal, Sir J. H. de Villiers C.J. held that the syndicate, having sold and transferred its interest in the claims to a company formed for the special purpose, among others, of gold mining, was liable to pay the stipulated sum.

Swinfen Eady, Q.C., and *Bremner*, for the appellants, contended that the sale by the appellants of the claims pegged by the respondent was not a flotation thereof within the meaning of the contract of July 17, 1894. They referred to the provisions of the agreement of March 13, 1895, between the appellants and the Charterland Goldfields Company, and contended that, on the face of the agreement according to its true construction, the sale thereby made was not a flotation and was not intended to be a flotation. On the contrary, it was provided that the respondent should be paid his 250*l.* for each block of ten claims if and when such claims respectively should be floated, thereby alluding to flotation as to something contingent and future. They also referred to the evidence given at the trial shewing that the sale to the company was made with a view to the development of the claims, and for their flotation after development if circumstances should permit. The option remained with the purchasing company whether or not they should float them hereafter. The sale itself was not intended to effect a flotation. In order that a sale of this kind should by itself constitute a flotation, it was necessary that the claims sold should be to a company formed for the purpose of working them at a profit, or bonâ fide intending to work them commercially. The Charterland Goldfields Company, it appeared from the evidence, did not intend to work them commercially,

J. C. 1900 TORVA EXPLORING SYNDICATE v. KELLY.

and never has done so. They also referred to the Mining Regulations of 1890 in force in Matabeleland at the date of the contract sued upon, to arts. 26 and 27, and to art. 28 as amended in 1892, and contended that it was not competent to the appellants to float their claims until after they had done some development work, had received from the Mining Commission an inspection certificate to the effect that the required work had been done, and had obtained the consent of the British South Africa Company.

Terrell, Q.C., and *R. J. Parker*, for the respondent, contended that there had been a flotation of claims within the meaning of the contract. A company had been formed the objects of which, as specified in its memorandum of association, were to prospect for, develop, explore, and maintain mineral mines, rights, properties, and works, to carry on and conduct all business incidental thereto, and to render the metals and minerals obtained merchantable and fit for use. The acquisition by a company so constituted of the claims pegged by the respondent amounted to a flotation thereof. And on the assumption that no flotation had occurred, the appellants were bound by their agreement to float the claims within a reasonable time, and had failed so to do. Not merely had they failed, but they had also put it out of their power to float them by having transferred them to the company. Unless flotation had been thereby effected, it never could be effected by the appellants.

Eady, Q.C., replied.

1900 *July* 7.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The question in this case is, What is the meaning of the word "flotation" as used in an agreement between a mining prospector and his employers, who were a syndicate or joint stock company limited by shares and formed apparently for the purpose of acquiring and dealing in mining claims and other property within the territories of the British South Africa Company?

The agreement in question is dated July 17, 1894. It was made between a Mr. Cresswell, the then manager of the Torva

Exploring Syndicate, Limited, acting on behalf of the syndicate of the one part and the respondent (who was plaintiff in the action) of the other part. The syndicate thereby hired the prospector for two months certain, and one month more if required. He was to devote all his time and attention to the interests of his employers, and to use his best endeavours to peg off payable mining properties in Matabeleland or Mashonaland for their benefit. He was to be paid a monthly salary of 15*l.*, and to be furnished with all necessary prospecting gear and provisions. The development or abandonment of all properties pegged off was to be at the discretion of the syndicate's representative, and all claims pegged off were to be transferred to the syndicate. Then follows this clause, on which the question turns:—

"7. The prospector shall receive from the syndicate the sum of 250*l.* (two hundred and fifty pounds) on flotation by the syndicate of every block of ten claims pegged by the prospector."

In the course of his service under this agreement the plaintiff pegged off 330 claims, or thirty-three blocks of ten claims each. They were pegged off under licences procured by the syndicate. No transfer was therefore necessary. They were all registered in the name of the syndicate or its nominees.

By an agreement dated March 13, 1895, the syndicate agreed to sell the whole of these 330 claims, together with certain other property, to the Charterland Goldfields, Limited, for the sum of 50,000*l.*, payable in fully paid shares of the purchasing company, who were besides to undertake the contracts and obligations of the syndicate, including their obligations to their prospectors. The sale was afterwards carried into effect. The purchase-money was paid, and the transfer was duly entered on the register of the British South Africa Company.

The objects for which the Charterland Goldfields, Limited, was established were, amongst others, "(*a*) to purchase . . . . mines and mineral properties . . . . to carry into effect . . . . an agreement with the Torva Syndicate" (being the agreement above stated); "(*b*) to prospect for, open, work, develop, and explore . . . . gold . . . . and other mines . . . . and to

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carry on and conduct the business of raising, crushing, washing, smelting, reducing, and amalgamating ores, metals, and minerals, and to render the same merchantable and fit for use." The capital of the company was 500,000*l.*, divided into 500,000 shares of 1*l.* each.

It was stated at the trial by the manager of the Charterland Goldfields that his company did not apply to the public for capital. But it was admitted that at the time of the trial there were probably about 2000 shareholders, and it was not denied that the shares were or had been at a premium.

Stopping at this point, and putting aside for the moment the Mining Regulations of the British South Africa Company, the result seems to be that the Torva Syndicate did in fact dispose of these mining claims at a good profit to a substantial company, having for its main purpose, or at any rate for one of its principal objects, the developing and working of gold mines. Is not that a flotation of these gold mining claims? The appellants say, No. They say that it is not flotation at all—at any rate, not the flotation contemplated by the agreement. "Flotation," they say, for the purposes of the agreement, means the disposing of mining claims to a joint stock company with the consent of the British South Africa Company after doing the necessary work and obtaining a certificate called the inspection certificate prescribed by the Mining Regulations of the British South Africa Company.

In order to shew the meaning of the term "flotation," reference was made to the Mining Regulations of the British South Africa Company and to the oral evidence given at the trial.

Turning first to the regulations of the British South Africa Company, we find the word "flotation" occurring in the Regulations of 1890, in a notice of May 17, 1892, amending one of those regulations, and in the Mines and Minerals Ordinance of 1895. No definition of the word is given. The interpretation clause of the Ordinance of 1895 declares that in the interpretation of that Ordinance all words shall be understood in the sense which they bear in ordinary use, and then it proceeds to define a great many expressions which are referred to as "special terms," amongst which the word "flotation" is

not to be found. It is, however, clear from s. 28 of the Mining Regulations of 1890 that "the flotation of a block" may be "into either a joint stock company or into a syndicate to further test the mine"—that is, as was conceded in the argument, either into a mining company or into a developing company, and it is equally clear that the consideration for a flotation may be scrip or shares of the company or syndicate into which the mining claims are floated.

The oral evidence as to the meaning of the term "flotation" does not help one much. No two of the witnesses agreed in their definitions. The plaintiff explained his view of the meaning of the word. He said that he discussed its meaning with Mr. Cresswell. He alleged that Mr. Cresswell, who acted for the syndicate, told him that there would be no difficulty in disposing of claims as soon as a sufficient number was obtained, and assured him that he would receive his share when the syndicate disposed of the claims whether they were transferred to a company or to an individual. That was all that "flotation" meant according to his view. Mr. Cresswell was not called by the defendants to contradict the plaintiff, or to explain the part he took in the transaction. There is this to be said for the plaintiff's view—that no doubt the primary object of making the prospector's remuneration depend on flotation was that the syndicate might not have to put their hands in their own pockets. It is difficult to suppose that the parties to the agreement concerned themselves about the protection of the British South Africa Company, who were quite able to take care of their own interests.

Besides calling a Mr. Heyman, who was managing director of "Willoughby's Consolidated" and formerly Civil Commissioner at Bulawayo, the defendants called Mr. Holland, the manager of the Charterland Goldfields, and Mr. Sauer, who was manager of the Rhodesian Exploration Company, chairman of the Chamber of Mines, and manager of other companies. Mr. Holland's view was that "flotation," according to the Stock Exchange use of the term, meant "inviting subscriptions from the public for the purpose of launching a company." "Flotation," he said, "is complete when the public have

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responded and the capital is provided." "There is no flotation of a company," he added, "if the shares are not publicly offered." Mr. Heyman said that "flotation" meant "the grouping of a certain number of claims to be formed in a gold mining company to be worked at a profit." But he rather disappointed expectations by saying he was not in a position to give an opinion as to Mr. Holland's definition; he was not an expert on mining; he was manager of his company purely for financial purposes. Mr. Sauer thought that "flotation of claims" was "the flotation of claims to work at a profit into a company ordinarily called a gold mining company." There were different kinds of flotation of claims, he said, "either into a developing company, a mining company, or other companies." In practice he would call the Charterland Goldfields a development company. But, on being referred by the Court to the memorandum of the Charterlands Goldfields, he added, "I would say Charterland Goldfields is a gold mining company." In further answer to the Court, he said that in applying the term "flotation of claims" a gold mining company actually working claims at a profit is meant. That, he said, is the intention, though it is very often badly expressed in the agreement.

Discarding some of the suggested conditions of "flotation" on which the learned counsel for the appellants no longer insist, such as Mr. Holland's view that there could be no flotation unless the shares were publicly offered and Mr. Sauer's notion that the company must be actually working at a profit, the fair result of the oral evidence seems to be that the disposition made by the syndicate of these mining claims was "flotation" according to the ordinary acceptation of that term. The learned Chief Justice who presided in the Court of Appeal corroborates this view by saying, "Quite independently of the evidence given in this case, I am of opinion that there has been a flotation of claims in the sense universally understood in South Africa."

Having expressed this opinion, the learned Chief Justice proceeds to consider whether the mining laws in force in the territories of the British South Africa Company at the date of

the contract require a different construction. The Court of Appeal, concurring with Vincent J. who tried the case, determine the question in the negative. Their Lordships agree in that conclusion; but as this was the principal point in the argument before this Board, it will be proper to add a few words on the subject. It may be observed in passing that apparently the point was not made by any witness at the trial or relied on in the argument before the judge of first instance. Its importance seems only to have been discovered in the argument before the Court of Appeal. It is probably owing to this circumstance that there is so little evidence about the actual practice of the British South Africa Company in regard to mining claims, while so much stress is now laid on regulations which appear to have been habitually disregarded.

The Mining Regulations No. 1, 1890, were nominally in force when the agreement of July, 1894, was made. Sect. 1 declares that the right of mining for and disposing of all minerals belongs to the British South Africa Company. Any person might take out a licence to prospect, paying stamp duty and signing a declaration of obedience to the company (ss. 3, 4). Every holder of a licence had the right to peg off ten quartz reefs claims in block. Then his title to these claims was to be inscribed in the Mining Commissioner's register and he was to receive a certificate, and thereupon his licence as a prospector ceased (s. 9). Every quartz reef claim registered by any prospector was held on joint account in equal shares with the company, and every transfer of the claimholder's interest in such claim was subject to the right of the company (s. 11). Every claimholder desirous of transferring his interest might effect such transfer at the office of the registrar of claims. The transfer was to be duly entered in a book to be kept for that purpose, and a certificate of transfer was to be granted (s. 17). No transfer was to be made until the same had been duly registered, and no registration was to be made until all dues were paid (s. 19). Every digger had to do a certain amount of work upon his block within a certain limited time under penalty of forfeiture, but the Mining Commissioner might extend the time at his discretion (s. 26). When the required amount of work

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was done the claimholder was bound to apply for an inspection certificate, and, on giving evidence of having opened up a payable reef and having done the required amount of work, he was to receive an inspection certificate certifying that the required work had been done (s. 27).

Then comes s. 28, on which the main argument of the appellants was founded. It provides that "when the claimholder shall have received his inspection certificate he shall request the company to make a proposal for the flotation of his block into either a joint stock company or into a syndicate to further test the mine. The company shall within a reasonable time either make a proposal or decline to do so." The section then proceeds to deal with each alternative. On any flotation the vendor's scrip was to be divided between the company and the claimholder. It is not very easy to see how that clause was to be worked. One of the defendants' witnesses calls it "pure nonsense." In May, 1892, the British South Africa Company issued a notice stating that the company waived its present option of flotation of mineral companies as laid down in its mining regulations, but retained the right of veto on any particular flotation, and required application for formal consent before any mineral companies could be floated. That notice does not seem to make the matter very much clearer. On being referred to ss. 27 and 28, Mr. Sauer, the chairman of the Chamber of Mines, said that the Chartered Company had not enforced their rights under this old law—"that is to say," he added, "they have never demanded their rights from claimholders."

Now the argument on the part of the appellants was this: They said that the parties to the agreement—the prospector and the syndicate—must have been familiar with the mining laws in force in the territories of the British South African Company; they must, therefore, have contracted on the basis of those regulations, and consequently "flotation" in the agreement must be confined to the particular kind of flotation referred to in s. 28—that is, flotation by the British South Africa Company, or by the claimholder with their consent, and in either case after the grant of an inspection certificate. But

that consequence does not necessarily follow. The word flotation in the agreement seems to be used generally. There is no limitation attached to it, nor any qualification of any sort. Why should it be confined to the particular flotation referred to in clause 28, which does not seem to have been a workable clause, nor one insisted upon in practice? The British South Africa Company are not prejudiced by a transfer of mining claims in accordance with their own regulations. All dues up to the time of transfer must be paid. They know what the consideration is. That must be set forth in the declaration made for the purpose of transfer duty. They may if they please demand one-half of the shares payable on the transfer. If they prefer to wait, or think it better not to insist on their rights, why should the prospector lie out of the remuneration which he has earned, and which his employers without taxing themselves are in a position to pay?

In the result their Lordships are of opinion that the fulfilment of the requirements of ss. 26, 27, and 28 does not enter into the definition of flotation, and is not a condition precedent to the flotation contemplated by the agreement of July, 1894.

Their Lordships were pressed by the learned counsel for the appellants to follow the decision of the Court of Appeal in England in an unreported case of *Gifford* v. *Willoughby's Mashonaland Exhibition Co.* The Court there rejected a similar claim by a prospector founded on an agreement expressed in the same terms as the agreement of July 17, 1894. Unfortunately the circumstances of that case are not such as to make it of much assistance. The case came from the Commercial Court. There was no evidence given there. The place of evidence was supplied by statements of counsel. It does not, however, appear what those statements were. Some evidence seems to have been given before the Court of Appeal. But that evidence, whatever it was, is left in equal obscurity. Nor has the decision itself the weight of a united judgment. Each of the learned judges seems to have taken a separate line, not always coinciding with the views of his colleagues nor always pointing in the same direction.

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Their Lordships will humbly advise Her Majesty that the appeal must be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Ingle Holmes, & Son.*
Solicitors for respondent: *Hutchinson & Sons.*

[PRIVY COUNCIL.]

J. C.* 1900 *July* 20, 28.

KING AND ANOTHER . . . . . APPELLANTS;

AND

CHEYNE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Vermin Destruction Act, 1890—*Local Government Act*, 1890, *s.* 428—*Vermin-proof Swing Gates.*

Under the provisions of the Victoria Vermin Destruction Act, 1890, vermin-proof swing gates can be lawfully put across roads other than main roads by owners of lands, whether adjoining owners or single owners, with the consent of the shire council, whether such lands are in special areas as defined by the Act or not.

Sect. 428 of the Local Government Act, 1890, does not, having regard to the exception therein contained, interfere with landowners' rights in this respect.

APPEAL from a judgment of the Full Court (May 29, 1899) allowing an appeal from an order of Hood J., and directing that an order be made absolute for the issue of a writ of mandamus commanding the municipal council of the Shire of East Loddon to open and keep open certain roads free from certain obstructions erected under permission purporting to have been given by the said council under the Vermin Destruction Act, 1890.

The substantial question involved in this appeal was whether s. 58 of the Vermin Destruction Act, 1890, set out in their Lordships' judgment, which according to its express terms is of general application, is, nevertheless, by virtue of the general

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY STRONG.

scope and context of the Act, and particularly of the next preceding and succeeding sections thereof, cut down and limited so as to apply only to certain "special areas" from time to time constituted under the Act.

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Haldane, Q.C., and *Sargant*, for the appellants, contended that the Court below was wrong in granting the mandamus applied for. Sect. 58 of the Vermin Destruction Act, 1890, is general in its terms, and applies to all lands in the Colony. It is not limited in its application to special areas. They referred to ss. 7 and 14, and contended that the duty was imposed upon all owners and occupiers of land to destroy vermin thereon. The duty was not confined to owners and occupiers of lands within special areas as afterwards constituted by the Act. Special areas were to be created merely for financial purposes. Lands within and without those areas are distinguished from one another only as regards financial purposes, not as regards the special duty imposed by the Act on all owners and occupiers indiscriminately. Sect. 428 of the Local Government Act admittedly does not restrict the powers conferred by s. 58 in question.

The respondent did not appear.

1900 *July* 28.

The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal is whether the appellants are entitled to maintain unlocked swing rabbit-proof gates across a public road.

The facts are as follows: The appellants are owners of land known as the Serpentine estate in the Shire of East Loddon, in the Colony of Victoria. In 1896 the appellants inclosed their lands with rabbit-proof wire fencing at their own expense. They obtained the permission in writing of the shire council, i.e., the municipal council, of the Shire of East Loddon, to erect wire-netting swing gates across some public roads which intersected the inclosed land, and they put up such gates accordingly. All this was done under the authority of s. 58 of the Vermin Destruction Act, 1890, which will be referred to hereafter. None of the roads so interfered with are main

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roads; nor is the land inclosed part of any special area as defined by the Vermin Destruction Act, 1890.

In 1898 the respondent and other inhabitants of the district in which the inclosed land lay applied for and obtained a rule nisi for a mandamus commanding the shire council to remove these gates on the ground that they were obstructions and illegal by virtue of s. 428 of the Local Government Act, 1890. The order nisi was discharged by the judge of first instance, Hood J., but on appeal to the Full Court his decision was reversed, and the order was made absolute. From this decision the appellants have obtained special leave to appeal to this Board. The shire council take no part in this appeal. The respondent has not lodged any case, nor has he appeared by counsel at their Lordships' bar to oppose the appeal. The only materials, therefore, before their Lordships are those furnished by the appellants and the Colonial statutes. The judgments of Hood J. and of the Court of Appeal are, however, before their Lordships.

The case really turns on three Colonial Acts of Parliament all passed on the same day. They are:—

1. The Local Government Act, 1890.
2. The Vermin Destruction Act, 1890.
3. The Fences Act, 1890.

They were all substantially re-enactments of previous Acts with amendments. By the Local Government Act, 1890 (No. 1112), s. 428, it is the duty of the council of every municipality, except as hereinafter or by any other Act of Parliament now or hereinafter to be in force provided, to open and keep open for public use and free from obstruction every surveyed and reserved road, street, or public highway required for public traffic, and proclaimed by this or any other Act within the municipal district. Penalties are imposed on persons infringing this enactment. But there is a provision to the effect that unlocked swing gates not being injurious to the public may be put up across any road by the adjoining owner with the licence of the Governor in Council on the application of the municipal council.

This is the enactment on which the respondents relied and

succeeded in their appeal in the Colony. This s. 428 no doubt throws upon the appellants the burden of shewing that the swing gates which are in question have been lawfully erected and may be kept across public roads. But the exception at the beginning of the section is very material, especially having regard to the fact that the Legislature when they were passing the Local Government Act were actually passing another Act specially relating to the erection of rabbit-proof gates across roads. Before noticing this Act it will be convenient to refer shortly to the Fences Act, 1890.

By this Act (No. 1092) the occupiers of adjoining lands are required to separate them by a fence at their joint expense (s. 5); and to keep the same in repair (s. 16). Special provision is made for lands bounded by streams (s. 6); for lands bounded by other lands not occupied (ss. 10, 13); and for the erection if desired of live fences (i.e., hedges) next roads (s. 14). There is no other express provision relating to fences by the sides of roads. Nor is there anything in this Act which authorizes the erection of any obstruction across a road. The Fences Act, 1890, is only important for the better understanding of the Vermin Destruction Act, 1890.

This Act (No. 1153) is divided into two parts. The first part imposes the duty of destroying vermin including rabbits (s. 3) on the occupiers and owners of land (s. 7), and this duty extends to half of all roads bounding their lands (s. 14). The first part of the Act also contains elaborate provisions for enforcing the performance of this duty: see Part I., ss. 3–44. Then comes Part II., which contains a series of enactments to facilitate the erection of vermin-proof fencing: see ss. 45–71. On a petition signed by the owner or owners of land desiring assistance, shire councils may obtain loans for inclosing lands with such fencing (ss. 45 et seq.). Such lands form special areas (s. 46). If advantageous, the lands of two adjoining owners may be inclosed with one vermin-proof fence instead of being separated by a dividing fence: see s. 49 (6) and s. 57.

The provisions specially applicable to the erection of gates across roads are ss. 57, 58, and 59. These are as follows:—

Sect. 57: "Any two or more owners of adjoining properties,

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with the sanction of the shire council if within a special area, instead of having dividing fences between such lands may inclose the whole of such adjoining lands with a continuous wire netting or other rabbit-proof or vermin-proof fence having when inclosing any road swing gates covered with wire netting."

Sect. 58: "Any owner of land intersected with roads with the sanction of the shire council instead of having dividing fences between such land may inclose at his own expense the whole of such land with a continuous wire netting or other rabbit-proof or vermin-proof fence having when enclosing any road swing gates covered with wire netting. Nothing in this or the preceding or following section shall authorize the inclosing as therein provided of any main road."

Sect. 59: "In inclosing any two or more adjoining properties with one continuous fence under this part of this Act it shall be lawful, with the approval in writing of the shire council, to erect such fence across any public road if in the opinion of such council such is not required for public use and if a swing gate with wire netting be erected wherever the fence crosses such road.

"If any person wilfully damages or destroys any such fence or swing gate erected across any such road or elsewhere or leaves any such swing gate open or breaks or injures any wire netting or other rabbit-proof or vermin-proof fence or portion thereof he shall on conviction be liable to be imprisoned for any period not exceeding six months and to pay a penalty not exceeding fifty pounds."

The whole question before their Lordships really turns on the true construction of s. 58. Hood J. thought that it plainly covered this case. But the Court of Appeal regarded s. 58 as confined to lands within special areas. This conclusion was arrived at by considering the position of s. 58 between ss. 57 and 59, which the Court read as confined to lands in special areas. The Court also thought that the words "instead of having dividing fences between such land," which occurs in s. 58, could have no meaning unless there was some duty to have such fences, and this duty could only be found imposed

on the owners of lands in special areas. The Court referred to s. 49 as imposing such duty on them. Their Lordships are unable to follow this reasoning.

The sections are not skilfully drawn. It does not appear to their Lordships that s. 57 is confined to adjoining lands in "special areas," although if they are in such areas the sanction of the shire council must be obtained, not only because s. 57 says so, but also because of s. 59. The necessity for saying so in s. 57 may perhaps be accounted for by the fact that s. 57 relates not only to the crossing of roads, but to the dispensation from the duty of having dividing fences as required by the Fencing Act, 1890. Sect. 59 has no reference to this duty, but is confined to putting gates across roads. The two sections are not coextensive in their operation, but both may be read as applying to the owners of adjoining properties, whether within special areas or not.

The words in s. 58, "instead of having dividing fences between such land," are very obscure. Between such land and what? The section does not say. If roads are meant, then s. 49 imposes no duty to have any vermin-proof dividing fences in special areas only. The dividing fences there spoken of are dividing fences between adjoining properties. Roads are not mentioned, although perhaps they may be included. Dividing fences are required, and are only required, by the Fences Act, 1890; but that Act applies to all lands, and not only to lands in special areas. If dividing vermin-proof fences are required in special areas, it must be because the shire council find them necessary as a rule and require them accordingly. This they can do whenever their consent is necessary, whether special areas are concerned or not.

Having carefully considered the various statutes and sections bearing on this question, their Lordships have come to the conclusion that the construction put by the Full Court on ss. 57, 58, and 59 of the Vermin Destruction Act, 1890, is narrower than is required either by the language of those sections or by the objects sought to be attained by them. It appears to their Lordships that, notwithstanding s. 428 of the Local Government Act, 1890, vermin-proof swing gates can be

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lawfully put across roads other than main roads under the provisions of the Vermin Destruction Act, 1890, by owners of lands, whether adjoining owners or single owners, with the consent of the shire council, whether such lands are in special areas or not. Their Lordships think it as well to add that in their opinion the Act does not impliedly or otherwise authorize adjoining owners of lands out of special areas to put vermin-proof swing gates across roads without the consent of the shire council.

Their Lordships will, therefore, humbly advise Her Majesty to allow this appeal, and to reverse the order appealed from. As regards the costs of the proceedings in the Colony, the appellants were not parties to them. The respondent must pay the costs of this appeal.

Solicitors for appellants: *St. Barbe Sladen & Wing.*

[PRIVY COUNCIL.]

J. C.* 1900 *July* 4, 21.

PENNY . . . . . APPELLANT;

AND

COMMISSIONER FOR RAILWAYS AND OTHERS . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Alternative Devise—"Such as should be living at Widow's Death and attain Twenty-one"—Vested Interests—Divesting—Construction.

Where there is a devise to five persons nominatim, or to such of them as should be living at the death of the testator's widow and attain twenty-one:—

Held, that all the devisees take vested interests in fee subject to be divested as regards each devisee dying in the lifetime of the widow in favour of those (if any) who survive her and attain twenty-one.

But where later clauses gave to each devisee a specifically described portion of the land devised for life in the event of all the devisees surviving the widow, and declared that "in case of the death of any of the

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY STRONG.

before-mentioned persons he gave and devised the share to which he would have been entitled " to his heir :—

Held, that the effect of this declaration was to alter the original devise, and to give the share of a devisee dying in the widow's lifetime to his heir, and not to the surviving devisees.

APPEAL from an order of the Full Court (Dec. 13, 1898) affirming an order of Walker J. (Sept. 8, 1898), which directed that certain moneys in court should be paid out in equal thirds to the respondents to the exclusion of the appellant.

The question was as to the construction of the will, sufficiently set out in their Lordships' judgment.

Walker J. held that the gift over " in case of the death " of any of the five beneficiaries of the share to which such beneficiary " would have been entitled " only applied in case all the said five beneficiaries should survive the testator's said wife, and should thereby acquire life estates in the said parcels specifically devised to them in that event. In his opinion the words " in case of the death " merely meant " on the death," and could not refer to the death of the beneficiary before the tenant for life; for he considered that a beneficiary so dying took nothing under the will, and also that such a construction might in certain events have produced an intestacy.

The Full Court held that the words " in case of the death " meant " in case of the death after the death of the testator's widow," which construction, they said, would make the will consistent throughout. They added that the only difficulty in that construction was that it did not give effect to the words " the share to which he would have been entitled," because after the death of the widow the share of the sons would be vested in possession. To give effect to those words, the death referred to must be death in the lifetime of the widow and before the sons' shares became vested in possession, and must be read in connection with the first part of the will. If so, they said, it was inconsistent with the devise to the survivors only, and, moreover, created an intestacy as to the ultimate fee in the event of all the sons surviving the widow. They thought, therefore, that those words must be disregarded; though it was hard to understand why the testator should

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leave out of his will the children of a son who predeceased his widow, when the children of a son who survived her took an estate in fee.

Alfred Adams, for the appellant, contended that the Courts below were not justified in disregarding the words "the share to which he would have been entitled." Those words were important as furnishing the real clue to the testator's meaning, and they govern the construction of the whole will. They shew that the clause in which they occur was intended to apply only to the case of a person dying before he did in fact become entitled to the share referred to, whereas the construction adopted in the Court below makes them equivalent to "the share to which he shall have become entitled." The judges considered that to treat them as referring to death before the tenant for life would (1.) be inconsistent with the original devise, which was only to such of the five as should survive the tenant for life, and (2.) would have produced an intestacy as to the ultimate fee if all five had survived her. But both grounds are erroneous. The original devise was not simply to such of the five as survived the tenant for life, but to all five nominatim, or such of them as should survive; and the proviso at the end of the will was intended to substitute the heir of any who did not so survive in the place of his ancestor. As to the second ground, the original devise in fee was not affected by the executory devise of the specific life estates except so long as they continued, and this would have prevented any intestacy: *Gatenby* v. *Morgan*. (1) On the other hand, if all of the five had predeceased the widow, there would, according to the construction adopted by the Full Court, have been an intestacy.

Cowell, for the respondents, submitted that there was no intestacy possible under the first clause, for its effect was to give vested interests to all the devisees on the death of the testator, subject to be divested in the case of any one of them who predeceased the widow—in which case the whole vested in the survivors: see *Sturgess* v. *Pearson*. (2) There was a clear

(1) (1876) 1 Q. B. D. 685. (2) (1819) 4 Mad. 411; 20 R. R. 316.

gift, in the events which had happened, to the respondents as the survivors. There were no subsequent words which cut it down. The meaning of the last clause was exhausted by preventing lapse (1.) in the case of any devisee dying before the testator; (2.) surviving the testator and dying before twenty-one; (3.) surviving the widow and dying before twenty-one. It ought not to be construed as applying to the very same contingency as that contemplated in the first clause, and as substituting a different disposition which amounted to a complete revocation of a vested gift by a conjectural construction not necessitated by either the context or the circumstances.

Vaughan Hawkins, for the Railway Commissioners.

Adams replied.

1900
July 21.

The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal turns entirely upon the construction of the will of James Williams, of Queanbeyan in New South Wales.

The testator when he made his will, and when he died, had a wife, four stepsons named Penny, and one son of his own. He owned about 1515 acres of land. His will is dated March 22, 1857, and he died on December 25 in the same year. His wife died in 1898. Two of his stepsons, namely, William Penny and Henry Penny, predeceased her. The appellant is heir to both of them, and claims as devisee the property which they would have taken if they had survived their mother. This claim is opposed by the surviving stepsons and son, who assert that they are entitled to the whole property.

Since the testator's death two portions of the testator's property have been taken by the Railway Commissioners of New South Wales, and, after settling the claims of the widow, they paid into the Supreme Court two sums, 382*l.* 2*s.* and 209*l.* 17*s.* 2*d.*, in respect of the lands so taken. The appellant claims two-fifths of these sums, but his claim has been disallowed, first, by Walker J., and again by the Supreme Court of the Colony. Hence this appeal.

The will is badly drawn, and is in some respects whimsical. It does not clearly provide for the events which have happened;

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and if the events clearly provided for had happened, questions of considerable difficulty would have arisen. The devisees would have found themselves much perplexed if they desired to dispose of the property given to them in favour of their own widows and children.

The following statement of the will taken from the appellant's case contains all that is material for consideration :—

" The said James Williams by his will dated the 22nd day of March 1857 appointed his wife Sarah Williams and Andrew Morton executors and trustees thereof and gave devised and bequeathed all his real estate to his said wife during her life and after her decease upon trust that his said executors and trustees should stand possessed of the same in trust for William James Penny Francis Penny Thomas Penny and Henry Penny sons of his said wife by a former marriage and his son James Williams or such of them as should be living at the time of the decease of his said wife and who should attain the age of 21 years and in case the said William James Penny Francis Penny Thomas Penny and Henry Penny and his son James Williams should all be living at the decease of his said wife and who should attain the age of 21 years then he gave and bequeathed to William James Penny a certain parcel of land containing 320 acres specifically described in the said will to the use of the said William James Penny and his assigns during his life and he gave and bequeathed unto Francis Penny another parcel of land containing 320 acres also specifically described to the use of the said Francis Penny and his assigns during his life and he gave and bequeathed unto Thomas Penny another parcel of land containing 320 acres also specifically described to the use of the said Thomas Penny and his assigns during his life and he gave and bequeathed unto Henry Penny another parcel of land containing 320 acres also specifically described to the use of the said Henry Penny and his assigns during his life and he gave and bequeathed unto his son James Williams another parcel of land containing 235 acres also specifically described being the residue of the testator's land to the use of the said James Williams and his assigns during his life and he declared that in case of the death of any of the before-

mentioned persons then he gave and devised the share to which he would have been entitled to the use of the person or persons who should then answer to the description of heir general to such person so dying as aforesaid her or their heirs and assigns for ever if more than one as tenants in common and upon to or for no other trust intent or purpose whatsoever."

In describing the parcels specifically devised the testator refers to each portion so devised as the land of the devisee, but the word share is not to be found in the will except in the last clause above set out.

The specific devises to the stepsons and son for their lives never took effect, for they were not all living when the widow died. The clauses which have to be considered are (1.) the clause which immediately follows the devise to the wife for life, and (2.) the last clause of all. But, although this is so, the existence of the series of specific devises for life must not be ignored; for the last clause not only follows them, but applies as well to them as to the first devise to the stepsons and son. The series of specific devises did in effect give each devisee a defined share of the testator's real estate; and their Lordships see no justification in so construing the last clause as to make it either inapplicable to the shares so specifically devised or applicable to them alone. The last clause appears to have been inserted to provide for the event of any devisee dying in his mother's lifetime, or, if he survived her, for the event of his dying under twenty-one. The Court of Appeal and Walker J. also appear to have treated the last clause as confined to the specific devises, and as having no application to the first clause; but this view is only arrived at by giving no effect to the important words in the last clause, "the share to which he would have been entitled." Their Lordships cannot regard any construction satisfactory which fails to give effect to these words. The key to the proper construction of this will is in their Lordships' opinion to be found by attending to the first clause, and reading the last clause as applying as well to it as to the series of specific devises interposed between these two clauses.

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The form in which the first devise to the stepsons and son is expressed is a very common form, and its effect is well established. It is not equivalent to a simple devise to such of the devisees as shall survive the widow and attain twenty-one. The effect of the clause is to give to all the devisees vested interests in fee subject to be divested as regards each devisee, in the event of his death in the lifetime of the testator's widow, in favour of those devisees (if any) who survive her and attain twenty-one. If there are none such the divesting clause fails, the original vested gifts remain, and all the devisees take absolutely. This was settled by *Sturgess* v. *Pearson* (1), as regards bequests of personal estate, and in this respect there is no difference between personal estate and real estate: see 1 Jarman on Wills, p. 827, 4th ed. The last clause in the will now in question modifies the first by saying in effect that if any devisee dies in his mother's lifetime and under twenty-one his share—i.e., the share to which he would have been entitled if he had survived her and attained twenty-one—shall go, not to the survivors, but to his heir as a purchaser in fee. It is true that the last clause says only in the case of his death, and does not say at what time. Death in the testator's lifetime may be meant; but it can hardly have been exclusively meant. Death before attaining a vested interest is covered by the words, and cannot be rejected as not intended by the testator. The event of death being inevitable, a gift to one person in the event of the death of another is only treated as a gift in remainder where the first taker takes for life only. A gift over of property given to a person absolutely in the event of his death is always construed as a gift over in the event of his death before the period of distribution or vesting unless some other period is indicated by the context: see the cases collected in Hawkins on Wills, pp. 254 et seq. This being in their Lordships' opinion the true construction of the will, it follows that the gifts over on the deaths of the two stepsons who died in the wife's lifetime took effect, and that the appellant as their heir is entitled as devisee to two-fifths of the money in court, and that the whole does not belong to the two stepsons and

(1) 4 Mad. 411; 20 R. R. 316.

the son who survived the wife as decided by the Supreme Court.

Their Lordships will humbly advise Her Majesty to allow the appeal and to reverse the orders appealed from, and to remit the petition to the Supreme Court with a declaration that, according to the true construction of the testator's will and the events which have happened, the appellant James Penny is entitled to two-fifths of the sums of 382*l.* 2*s.* and 209*l.* 17*s.* 2*d.* in the petition mentioned, and to two-fifths of any interest or dividends which may have accrued in respect of those sums since the payment thereof into the Supreme Court, and to direct that the costs of the original petition be borne as ordered by the order of September 8, 1898, and the costs of the appeal to the Supreme Court be borne by the respondents other than the Railway Commissioners. The costs of the appellant of the appeal to this Board will also be borne by the same respondents, and will be taxed on pauper scale. But the Railway Commissioners must bear their own costs.

Solicitor for appellant: *George Slade.*
Solicitors for Railway Commissioners: *Light & Galbraith.*
Solicitors for other respondents: *Snow, Snow & Fox.*

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1900, will be as follows :—

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ADMINISTRATION—*Separate Account, Fund carried to—Assignment of Separate Fund—Notice—Equity against Assignee—Administration Suit—Appeal from New South Wales.*
Where a fund in court in an administration suit is carried to a separate account, the persons specified in its heading are the owners of the fund so far as is consistent with its retention in court released from the general questions in the cause and free from claims by other sharers in the estate.
Where a fund standing to a separate account is specifically assigned for value by a person entitled thereto according to the terms of the account :—
Held, that the assignor's general liability to other parties to the suit to make good defaults in

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his character of trustee of the estate cannot be enforced against this fund in the hands of its assignee for value without notice.
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ARBITRATION—*Award—Lump Sum—Evidence taken on Matters not Referred—Jurisdiction of Arbitrators—Appeal from Victoria.*

In an action upon an award the defendants pleaded that the lump sum awarded included matters, claims, and demands in respect of which the arbitrators had no jurisdiction, as not having been referable to them under the terms of the contract between the parties:—

Held, that, as it appeared that the matters actually referred were those contained in the submission, the award was not bad (1.) on the face of it by reason that it did not state that matters not referred had been rejected from consideration; (2.) because the arbitrators had taken evidence on matters not referred, but not shewn to have been irrelevant to the inquiry, or to have been included in the award of the lump sum.

The defendants having counter-claimed in respect of liquidated damages for delays not allowed in writing by their engineer-in-chief:—

Held, that the counter-claim must be disallowed, for the refusal to allow delays was itself by the terms of the contract subject to arbitration, and a final award was by the same terms competent without sending the matter back to the engineer. Falkingham *v.* Victorian Railways Commissioner - - - - P. C. 452

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COMPANY—*Promoters—Secret Profit by Promoters—Duty of Disclosure.*

A syndicate was formed to raise a fund, buy a property, and resell it to a company or some other purchaser; the fund to be in the names of trustees who were to promote and register a company to which they should resell the property, and who if a company should be formed were to be directors. The trustees bought up some of the charges upon the property for sums below the amount which the charges afterwards realized, and thereby made a profit for the syndicate of 20,000*l.* They bought the property for 140,000*l.*, formed a limited company and resold the property for 180,000*l.* to the company, of which they were the first and at that time the only directors. They issued a prospectus inviting applications for shares and disclosing the two prices of 140,000*l.* and 180,000*l.* but not the profit of 20,000*l.* That some profit had been made by buying up the charges might have been discovered by a close examination of a contract which was referred to in the company's memorandum and articles of association and in the prospectus. Shares were issued and the company afterwards went into liquidation:—

Held, that the trustees ought to have disclosed to the company the profit of 20,000*l.*; that they had not disclosed it; that the fact that the company could not now rescind was no bar to relief; and that the appellant as one of the trustees was bound to replace that portion of the 20,000*l.* which had been paid to the trustees as their share.

The decision of the Court of Appeal, *In re Olympia, Limited*, [1898] 2 Ch. 153, affirmed.
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CONTRACT—*Agent—Authority of—Lump Sum—Variation—Ratification—Appeal from Victoria.*

Where the plaintiffs contracted with the agent of an absent shipowner to effect certain specified repairs (all confined to damage by stranding), and instead of doing the work as stipulated alleged that they had, on the agent's authority, done the equivalent thereto or better, and in the same contract stipulated that they should be paid for repairs due to deterioration at scheduled prices stated by them:—

Held, that, it appearing that the agent's authority to their knowledge was limited to the said specified repairs, they could not recover on the contract, which was an entire one, and in its entirety had never been performed:

Held, further, that the shipowner having taken the ship as repaired and sold, it did not thereby ratify the contract.

Appleby v. *Myers*, (1867) L. R. 2 C. P. 651, followed. FORMAN & Co. PROPRIETARY, LIMITED *v.* THE SHIP "LIDDESDALE" - - P. C. 190

CONTRACT—*continued.*

2. —— *Conditional Promise to consider a Proposal favourably—Construction of Contract—Appeal from Canada.*

Held, reversing the judgment of the Courts below, that a written promise by the appellants that if satisfied with the respondent as a customer they would favourably consider any application by him to renew a subsisting contract between them on its expiration does not impose a legal obligation to grant it. MONTREAL GAS COMPANY *v.* VASEY - - - - - **P. C. 595**

3. —— *Evidence—Admissibility of Extrinsic Evidence—"Total Cost of Works"—Construction of Contract—Appeal from New South Wales.*

Words with a fixed meaning in a written contract cannot be explained by oral evidence to mean something different from what they express. Where the words used are susceptible of more than one meaning extrinsic evidence is admissible to shew what were the facts which the negotiating parties had in their minds.

Where a written contract provided that the respondent, a railway engineer, should receive extra commission "on the estimate of 35,000*l.* in the event of my being able to reduce the total cost of the works below 30,000*l.*" :—

Held, that evidence was rightly admitted to shew to what items of cost the estimate related. BANK OF NEW ZEALAND *v.* SIMPSON - **P. C. 182**

4. —— *Telegraphic Code—Cablegrams—Mistake—Action on Contract—Onus probandi—Appeal from New South Wales.*

Where parties have corresponded by means of a telegraphic code, it is for the plaintiff, in an action for breach of contract, to shew that the proposal made by him and accepted by the defendant is so clear and unambiguous that the defendant cannot be heard to say that he misunderstood it. It is not a matter for the Court to construe. FALCK *v.* WILLIAMS **P. C. 176**

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COPYRIGHT — *Newspaper — Reports of Public Speeches—"Author" of Report—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 18.

A person who makes notes of a speech delivered in public, transcribes them, and publishes in a newspaper a verbatim report of the speech, is the "author" of the report within the meaning of the Copyright Act 1842, is entitled to the copyright in the report and can assign the copyright.

So held by the Earl of Halsbury L.C. and Lords Davey, James of Hereford, and Brampton, Lord Robertson dissenting.

The decision of the Court of Appeal, [1899] 2 Ch. 749, reversed, the decision of North J. restored and the injunction made perpetual. WALTER *v.* LANE - - - **H. L. (E.) 539**

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DOMICIL—*International Law—Marriage—Matrimonial Domicil—Movable Goods—French Law—Community of Goods.*

A Frenchman and Frenchwoman married in France without any contract, so that according to French law their rights inter se as to property were subject to the law of community of goods. They came to England and were permanently domiciled there. The husband became a naturalized British subject, amassed a large fortune and died in England, leaving his wife surviving and having made an English will by which he disposed of all his property :—

Held, that as to movable goods the rights of the wife under the French marriage law as to community of goods were not affected by change of domicil, and that the widow was entitled to the share of her husband's personal estate to which she would have been entitled if they had remained domiciled in France.

The decision of the Court of Appeal, [1898] 2 Ch. 60, reversed and the decision of Kekewich J., [1898] 1 Ch. 403, restored.

Lashley v. *Hog*, (1804) 4 Paton, 581, distinguished. DE NICOLS *v.* CURLIER **H. L. (E.) 21**

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ECCLESIASTICAL LAW—*Clergy Discipline—Practice—Special Leave to Appeal—Frivolous Application—Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *s.* 4, *sub-s.* 2.

Leave to appeal will not be given under the Clergy Discipline Act, 1892, s. 4, sub-s. 2, in respect of the facts unless there is a primâ facie case; and, in the absence of even a definite suggestion to that effect, an application for leave is idle and frivolous. *In re* EVANS *v.* WOODS. *Ex parte* WOODS - - - P. C. 338

EMPLOYER AND WORKMAN—*Compensation—Arbitration — Time for taking Proceedings — "Claim for Compensation"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 2, *sub-s.* 1.

By s. 2, sub-s. 1, of the Workmen's Compensation Act, 1897, proceedings for the recovery under the Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable, and unless "the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury . . . ."

"The claim for compensation" means, not the initiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of a claim for compensation sent to the workman's employer.

A workman who had been injured in the course of his employment sent to his employers within six months a notice of the accident and also a notice stating that he claimed a certain amount as compensation for the injury. More than six months after the accident he filed a request for arbitration in the county court:—

Held, that the proceedings were in time.

The decision of the Court of Appeal, [1900] 2 Q. B. 145, reversed and the award of the county court judge restored. POWELL *v.* MAIN COLLIERY COMPANY - - H. L. (E.) 366

2. —— *Compensation—Dependants—Evidence of Dependency on Child's Earnings—Standard of Living — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

A father earning wages may be in part dependent upon the earnings of his child within the meaning of the Workmen's Compensation Act, 1897, and there is evidence upon which the father may be found to be in fact so dependent and to be entitled to compensation for the death of the child, where it is proved that the child contributed to the family wages fund, that the father received the contribution and spent it in maintaining himself and his family.

Whether there is dependency is entirely a question of fact in each case, irrespective of the standard of living in the neighbourhood or the class to which the family belong. The Act sets up no such standard: the actual means of living and expenditure need alone be regarded. (See the judgments of Earl of Halsbury L.C. and Lord Davey; Lord Shand contra.)

Simmons v. *White Brothers*, [1899] 1 Q. B. 1005, discussed. MAIN COLLIERY COMPANY *v.* DAVIES - - - - H. L. (E.) 358

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See REVENUE. 1.

FISHERY—*Salmon Fishery Acts—Illegal Methods—Fixed Engines—Toot and Haul Net—Prescription.*

The toot and haul net used in the estuary of the Tay is fastened by a rope at one end to the shore. The net is then placed on a boat or coble; the boat with its net is pulled out by means of an overhaul rope to an anchor in the stream; the boatman on reaching the anchor attaches the net at about twenty yards from its end to a floating rope fastened to the anchor; the end of the net is then turned inward towards the shore forming a bend or hook, and the men on shore haul the net taut. Another rope attached to the boat keeps the net upright. The net is retained in this upright position until a fish strikes it, when the outer end is freed and hauled in by fishermen on shore so as to encircle the fish:—

Held, affirming the decision of the First Division of the Court of Session, (1899) 1 F. 651, that this mode of fishing for salmon was an illegal method within the meaning of the Salmon Fishery Acts.

SECOND APPEAL.

Salmon Fishing—Hang Nets—Illegal Methods.

The drift or hang nets used in the river Tay are from 80 to 220 yards long and 12 to 19 feet

FISHERY—*continued.*
in depth, and are shot into the river about an hour before the turn of the tide both at high and low water, when the current is least. They are run out of a boat over the stern, in a straight line across the river, and followed with the current by a man in a boat, who, when he sees or feels the net struck by a fish, rows to the spot and captures the fish entangled in the net, or, if the fish is getting away, he secures it with a gaff. The net is not fixed to any post on the shore :—

Held, reversing the decision of the First Division of the Court of Session, that fishing in the tidal portions of the river Tay with drift or hang nets was an illegal method of fishing for salmon within the meaning of the Salmon Fishery Acts. WEDDERBURN *v.* DUKE OF ATHOLL. DUKE OF ATHOLL *v.* GLOVER INCORPORATION OF PERTH H. L. (Sc.) 403

"FLOTATION" — Contract — Construction — British South Africa Company's Mining Ordinance - - - - 612
See PRIVY COUNCIL APPEALS. 6.

FORMÂ PAUPERIS—Appeal in formâ pauperis —Special leave to appeal - - 496
See PRACTICE. 1.

—— Costs in pauper appeals—Appeal from New Zealand - - - - 446
See HUSBAND AND WIFE.

FRENCH LAW—Matrimonial domicil—International law—Movable goods—Community of goods - - - 21
See DOMICIL.

FRIVOLOUS APPLICATION—Practice—Clergy Discipline Act, 1892—Special leave to appeal - - - - 338
See ECCLESIASTICAL LAW.

GUARANTEE—Concealment of material facts—Uberrima fides - - - 135
See INSURANCE, GUARANTEE.

GUERNSEY—Law of—Illegal stretching of telephone wires across public streets—Powers of local authority—Removal of wires - - - - 317
See TELEPHONE.

"HERITOR"—Church and manse—Assessment of way-leave - - - 91
See WATERWORKS.

HIGHWAY — *Rate — Exemption — Liability to Repair Ratione Tenuræ—Sum paid in Discharge of Liability—Highway Act*, 1835 (5 *&* 6 *Will.* 4, *c.* 50), *s.* 33—*Highway Act*, 1862 (25 *&* 26 *Vict. c.* 61), *s.* 35.

In a hamlet forming part of a township all the highways were repairable by the occupiers of lands ratione tenuræ, and highway rates were not leviable by reason of the exemption in the Highway Act, 1835, s. 33. A railway company occupied lands in the hamlet, and, prior to the after-mentioned order, were liable ratione tenuræ to repair a portion of a highway therein. An order was made by justices under the Highway Act, 1862, s. 35, by which it was declared that all the highways in the hamlet should be parish

HIGHWAY—*continued.*
highways, and be repaired by the highway board of the district in which the hamlet was situated. The order fixed the sums to be paid by the respective occupiers of lands previously liable to repair ratione tenuræ "in full discharge of all claims thereafter in respect of the repair and maintenance of the highways" as provided by the Act. These sums were nominal in amount. They were duly paid. The company were subsequently rated in respect of their lands in the hamlet for expenses incurred in the repair of highways within the district, including those in the hamlet :—

Held, that the order did not operate to deprive the railway company of their previously existing exemption from highway rates, and that the company were exempt from payment of so much of the rate as was levied in respect of the repair of highways in the hamlet.

The decision of the Court of Appeal, [1899] 1 Q. B. 1026, affirmed. DALTON OVERSEERS *v.* NORTH EASTERN RAILWAY - H. L. (E.) 345

HOUSE DUTY—Exemption in favour of buildings occupied for trade only - - 383
See REVENUE. 2.

HUSBAND AND WIFE—*Separation and Annuity Deed—Suit to set it aside—Discredited Fraudulent Representations—Subsequent Adultery of Wife—Practice as to Costs in Pauper Appeals—Laws of New Zealand.*

A deed of separation and annuity will not be set aside at the instance of the husband on the ground of fraudulent representations by the wife as to her innocence which were discredited by him at the time of its execution, nor on the ground of subsequent adultery, when the deed contains no condition as to chastity.

Decree reversed with such costs as are payable in the Colony in pauper appeals; the appellant to be entitled to such costs of the appeal as she would be entitled to according to the rule which prevails in the House of Lords, which rule is adopted by the Board. WASTENEYS *v.* WASTENEYS - - - - - P. C. 446

—— Advances—Purchases by husband in names of wife and daughter—Account—Law of Quebec - - - - 299
See PRIVY COUNCIL APPEALS. 1.

HYPOTHECARY PRIVILEGE — Builder's privilege—Law of Quebec - - 600
See PRIVY COUNCIL APPEALS. 2.

IMMUNITY CLAUSE—Breach of trust—Liability of trustee—Negligence - - 271
See TRUSTEE.

INCOME TAX — Assessment —Income from ore produced in New South Wales and sold outside it - - - - 588
See PRIVY COUNCIL APPEALS. 11.

INFANT—Lease of coal—Adoption—Coal below low water-mark—Barony title - 48
See MINES. 2.

INHABITED HOUSE DUTY — Exemption in favour of buildings occupied for trade only - - - - 383
See REVENUE. 2.

INLAND REVENUE.
See REVENUE.

INN—Rateable value—Evidence of trade and profits - - - - 150
See POOR-RATE.

INSURANCE, GUARANTEE — *Concealment of Material Facts—Uberrima Fides.*

On the application of the appellant the respondent, an underwriter at Lloyd's, underwrote an instrument in the form of a policy whereby he guaranteed the solvency of a person who was surety for the repayment by the borrower of money lent by the appellant. The respondent made no inquiry as to the rate of interest payable by the borrower or as to the circumstances of the loan, and no information was given to him on those points. In fact the interest was over 30 per cent. and the borrower was unable to repay the loan. In an action on the policy the jury found that the transaction was not one of exceptional risk :—

Held, that the non-disclosure of the rate of interest and the circumstances of the loan did not constitute a defence, there being no evidence that those facts were material to the only risk undertaken by the respondent, namely, the solvency of the surety.

The decision of the Court of Appeal, [1899] 1 Q. B. 782, granting a new trial, reversed. SEATON *v.* BURNAND. BURNAND *v.* SEATON H. L. (E.) 135

INSURANCE, MARINE—*Ship Docked for Repair of Sea Damage—Ship Surveyed while in Dock for Lloyd's Classification — Apportionment of Dock Charges and Expenses—Contribution.*

There is no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit from it.

During a voyage covered by a policy of marine insurance a vessel was damaged by a peril insured against and was therefore put into dry dock for the necessary repairs. The survey of the vessel for renewing her classification was not due, but the owners (without causing delay or increase of dock expenses) took advantage of her being in dry dock to have the survey made, and her classification was renewed :—

Held, that the expenses of getting the vessel into and out of the dock, as well as those incurred in the use of the dock, fell upon the underwriters alone, and could not be apportioned between them and the owners.

The decision of the Court of Appeal, [1898] 1 Q. B. 722, reversed.

The Vancouver Case (*Marine Insurance Co.* v. *China Transpacific Steamship Co.*), (1886) 11 App. Cas. 573, distinguished. RUABON STEAMSHIP COMPANY *v.* LONDON ASSURANCE H. L. (E.) 6

INTERNATIONAL LAW—Matrimonial domicil — Movable goods—French law—Community of goods - - - 21
See DOMICIL.

INTOXICATING LIQUORS—Canada Temperance Act—Construction - - 212
See PRIVY COUNCIL APPEALS. 4.

JAMAICA—Laws of - - - - 480
See PRIVY COUNCIL APPEALS. 8.

JOINT LESSEE—Notice of abandonment by a—Joint gold-mining lease—Law of New South Wales - - - 293
See MINE. 1.

JURISDICTION — Arbitrators — Award — Lump sum — Evidence taken on matters not referred - - - - 452
See ARBITRATION.

—— To order a stay of sale in execution - 496
See PRACTICE. 1.

JURY—Question of fact not submitted to jury—New trial—Issue of fact as to variation of easement claimed — Appeal from Jamaica - - - - 480
See PRIVY COUNCIL APPEALS. 8.

LANDOWNER—Railway company — Way-leave — Construction — Ancient document — Contemporaneous usage or interpretation - - - - - 260
See WAY-LEAVE.

LANDS CLAUSES—Minerals—Notice of intention to work — Compensation — Arbitration —Duty of company to take up award
See RAILWAY. 109

LEASE—Joint gold-mining lease — Notice of abandonment by a joint lessee—Law of New South Wales - - - 293
See MINES. 1.

—— Minor—Adoption—Coal below low water-mark—Barony title - - 48
See MINES. 2.

LIFE-RENT — Rents and profits —"Opened mines" - - - - 83
See MINES. 3.

LIGHTSHIP — Loss of use of — Collision — Damages—Remoteness of damage 113
See SHIPPING. 3.

LIMITATIONS, STATUTE OF—Rights of beneficiaries whose trustees are barred — Interest in land — Law of New South Wales - - - - 563
See PRIVY COUNCIL APPEALS. 10.

LOCAL GOVERNMENT—Rates—Artificial reservoir—"Land covered with water" - 3
See RATES. 1.

—— Streets—Telephone wires—Illegal stretching of, across public streets—Powers of local authority—Removal of wires 317
See TELEPHONE.

LONDON — Rates — Quinquennial valuation — Alteration in value of hereditament—Cause of alteration—Onus of proof 510
See RATES. 2.

LOST WILL — Evidence — Presumption that it was destroyed by testator—Presumption against fraudulent abstraction - 604
See WILL. 4.

LUMP SUM—Award—Evidence taken on matters not referred—Jurisdiction of Arbitrators 452
See ARBITRATION.

MARINE INSURANCE - - - 6
See INSURANCE, MARINE.

MARRIAGE — Domicil — International law — Movable goods — French law — Community of goods - - - 21
See DOMICIL.

MAXIM OF LAW—Uberrima fides - 135
See INSURANCE, GUARANTEE.

METROPOLIS—Quinquennial valuation—Alteration in value of hereditament—Cause of alteration—Onus of proof - 510
See RATES. 2.

MINES — *Joint Gold-mining Lease — Notice of Abandonment by a Joint Lessee—Appeal from New South Wales.*

Written notice by a joint holder of a gold-mining lease to his co-lessees that he is unable to contribute to the joint expenses, and that they may do as they like with it, is an abandonment of his beneficial interest therein. The subsequent working of the lease by the respondent, a co-lessee, out of his own resources, is an acceptance of the abandonment:—

Held, that neither the retiring lessee nor, on his bankruptcy, his official assignee was entitled to any share of the price realized by the respondent's sale of the lease. PALMER *v.* MOORE P. C. 293

2. —— *Minerals—Coal below Low Water-mark—Barony Title.*

The doctrine of possession by prescriptive working of minerals applicable to the foreshore ex adverso of a barony granted with parts and pertinents, cannot be extended to a barony granted with power to work minerals infra fluxum maris, because these words shew that the grant is limited to the minerals under the foreshore only. Nor can such prescriptive use be extended to a third barony where a barony with a bounding charter lies between.

Quære, whether the doctrine can be extended to cover minerals running from the foreshore under the sea-bed.

Adoption—Minor—Lease of Coal.

The right of a proprietor of estates adjoining the sea to work the coal below low water-mark was challenged by the Crown during the proprietor's minority. The estates to which the minor had succeeded consisted in part of entailed and in part of unentailed lands. The administration of the unentailed lands was vested in the testamentary trustees of the minor's father, who were also curators of the minor. These trustees, without the concurrence of the minor, entered into a transaction with the Crown whereby they on their part accepted a lease of the whole coal below low water-mark ex adverso of both the entailed and unentailed lands, and the Crown agreed not to claim damages in respect of coal which had been worked in the past. After the proprietor came of age, he accepted an assignment of the lease, and subsequently applied for and obtained from the Crown a reduction of the royalty payable under the lease, and a modification of the whole mode of working the coal. When the proprietor so acted in regard to the

MINES—*continued.*

lease, he was unaware that he had a claim to some of the coal below low water-mark. In an action brought by the proprietor fourteen years after he had reached majority, concluding, inter alia, for a declarator that he was not bound by the lease:—

Held, reversing the decision of the First Division of the Court of Session, (1897) 24 R. 216, that the actings of the proprietor after he came of age barred him from challenging the lease. LORD ADVOCATE *v.* WEMYSS - H. L. (Sc.) 48

3. —— *Minerals—Life-rent—Rents and Profits—"Opened" Mines.*

By ante-nuptial contract of marriage dated 1882, in English form, G., the absolute owner of the estate of C., bound herself to convey, and did convey, her estate to trustees. The settlement contained the usual power of sale, and in the meantime the trustees were to lease the unsold parts, and to hold the net proceeds of such sales, as well as net rents and profits of the estate until sold, upon trusts thereinafter declared, "with such powers of leasing the lands and hereditaments and other powers necessary and expedient in the execution of the trust." The trusts were declared, and it was provided that until the estate should be sold the trustees were to apply the rents and profits to the persons and for the purposes to which the annual income of the money arising from the sale of the estate would be paid under the trust. Under the trust the annual income of the proceeds of the sale of the estate was to be paid to G. during her life, and after her death to her husband, and after their deaths the trustees were to hold the trust premises and the annual income thereof for the children of the marriage as the parents should appoint. There was one child of the marriage. Stone quarries on a portion of the estate had been worked at intervals for about a century; but during 1882, and for four years before 1882, no quarries had been worked. In 1895, the estate not having been sold, the trustees leased the stone in forty-five acres, including the portion already worked, at a fixed rent with a royalty on the amount of stone sold:—

Held, reversing the decision of the First Division of the Court of Session, (1898) 25 R. 475, that the quarries at the date of the marriage settlement were "opened mines," and the rent and royalty fell to be paid to G. as annual income from the estate, and did not fall to be accumulated for the benefit of the child of the marriage. GREVILLE-NUGENT *v.* MACKENZIE H. L. (Sc.) 83

—— Arbitration—Duty of company to take up award—Compensation—Notice of intention to work - - - - 109
See RAILWAY.

—— "Flotation" — Contract — Construction — British South Africa Company's Mining Ordinance - - - - 612
See PRIVY COUNCIL APPEALS. 6.

—— Rents and royalties from mining leases—Accumulations—Tenants for life—Remaindermen - - - - 163
See WILL. 1.

MISTAKE—Contract—Action on—Onus probandi—Cablegrams - - - 176
See CONTRACT. 4.

NATAL—Laws of - - - - 225
See PRIVY COUNCIL APPEALS. 9.

NAVIGATION—Responsibility for—Charterparty—Obligation of shipowner to supply ballast - - - - 525
See SHIPPING. 1.

NEGLIGENCE — Breach of trust — Immunity clause—Liability of trustee - 271
See TRUSTEE.

NET—Salmon Fishery Acts—Illegal methods
See FISHERY. 403

NEW SOUTH WALES—Laws of.
See Cases under PRIVY COUNCIL APPEALS—NEW SOUTH WALES.

NEW TRIAL—Question of fact not submitted to jury—Issue of fact as to variation of easement claimed—Appeal from Jamaica
See PRIVY COUNCIL APPEALS. 8. 480

NEW ZEALAND—Laws of.
See Cases under PRIVY COUNCIL APPEALS—NEW ZEALAND.

NEWSPAPER — Reports of public speeches—"Author" of report - - 539
See COPYRIGHT.

NONSUIT—Discontinuance - - - 19
See PRACTICE. 3.

NOTICE—Separate account, Fund carried to—Assignment — Notice — Equity against assignee - - - - 431
See ADMINISTRATION.

ONUS PROBANDI—Contract—Action on—Cablegrams—Mistake - - - 176
See CONTRACT. 4.

PETITION OF RIGHT—Appeals from judgment on—Practice - - - 103
See PRIVY COUNCIL APPEALS. 3.

PITCH—Account—Entries disallowed—Discretion of Court - - - 173
See ACCOUNT.

POOR-RATE — *Public-house — Rateable Value — Evidence of Trade and Profits—Parochial Assessment Act*, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.

In assessing the value of a licensed public-house for the poor-rate the existence of the licence and the amount of the trade which can be and has actually been carried on there are elements to be considered in order to arrive at the rent at which the house may reasonably be expected to let. Evidence of these facts is always admissible, and may be necessary where the ordinary evidence of market value by comparison with other public-houses is not to be had. Evidence of profits made is also admissible, but an inquiry into profits should be avoided where possible, because it is regarded as inquisitorial and oppressive. These are not rules of law but matters of practice and common sense, and it is not expedient to lay down rules about them.

The decision of the Court of Appeal, [1899] 1 Q. B. 667, affirmed.

Dodds v. *South Shields Union*, [1895] 2 Q. B. 133, commented on. CARTWRIGHT *v.* SCULCOATES UNION - - - - H. L. (E.) 150

PRACTICE—*Appeal—Special Leave to Appeal—Appeal in formâ pauperis—Jurisdiction to order a Stay of Sale in Execution—Appeals from the Windward Islands and the Royal Court of St. Lucia.*

Where a petitioner had obtained leave to appeal in regular form, an order granting leave to prosecute it in formâ pauperis was made.

On petition for special leave to appeal (1.) from a decree in a matrimonial separation suit, (2.) in a mortgage suit, (3.) from an order for execution of the last-mentioned decree:—

Held, that there being ground for appealing from the mortgage decree, the leave should be extended to both suits, which were mixed up together.

Their Lordships have no jurisdiction to order a stay of sale in execution. QUINLAN *v.* CHILD. QUINLAN *v.* QUINLAN. *Ex parte* QUINLAN P. C. 496

2. —— *Costs—Public Authorities—Judgment for Defendants—Action for Acts done in Execution of Statute—Costs as between Solicitor and Client—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

By the Public Authorities Protection Act, 1893, s. 1, judgment for the defendant in an action brought in respect of acts or alleged defaults in execution of an Act of Parliament, or of any public duty or authority, carries costs as between solicitor and client. This provision does not apply to appeals.

The decision of the Court of Appeal, reported as *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1, affirmed. FIELDEN *v.* MORLEY CORPORATION H. L. (E.) 133

3. —— *Nonsuit — Discontinuance — Rules of Supreme Court, Order* XXVI., *rr.* 1–4.

A plaintiff cannot now elect to be nonsuited; if he offers no evidence at the trial the defendant is entitled to a verdict.

The decision of the Court of Appeal, [1898] 1 Q. B. 636, affirmed. FOX *v.* STAR NEWSPAPER COMPANY - - - - H. L. (E.) 19

—— Appeal—Clergy Discipline Act, 1892—Special leave to appeal—Frivolous application - - - - 338
See ECCLESIASTICAL LAW.

—— Appeals from judgment on petition of right
See PRIVY COUNCIL APPEALS. 3. 103

—— Costs in pauper appeals—Appeal from New Zealand - - - - 446
See HUSBAND AND WIFE.

—— New trial—Question of fact not submitted to jury—Issue of fact as to variation of easement claimed—Law of Jamaica
See PRIVY COUNCIL APPEALS. 8. 480

PRESUMPTION—Lost will—Evidence—Presumption that it was destroyed by testator—Presumption against fraudulent abstraction - - - - - 604
See WILL. 4.

PRINCIPAL AND AGENT—*Authority of Agent—Consideration moving from the Principal—Special Damage—Appeal from New Zealand.*

The plaintiff's agent obtained from the defendant bank a promise to pay certain cheques drawn by the plaintiff in consideration of his depositing with it a store warrant in lieu of the cash which the plaintiff had instructed him to pay to the credit of the plaintiff's account. The store warrant belonged to the plaintiff, was under pledge to the agent, and was accepted by the bank with full knowledge of the circumstances:—

Held, in an action for dishonouring the cheques, that the agent in substituting the deposit for cash did not exceed his authority, but that even if he had, the contract was complete, for there was consideration for the bank's promise. The deposit conferred on the bank some right, interest, profit, or benefit within the legal meaning of consideration; and in the circumstances it could not be heard to say that that consideration did not move from the plaintiff:

Held, further, that evidence of special damage—that is, of plaintiff's loss of custom and credit from particular individuals—was wrongly admitted; special damage not having been alleged. FLEMING *v.* BANK OF NEW ZEALAND - **P. C. 577**

PRIVILEGE—Builder's—Hypothecary privilege—Law of Quebec - - 600
See PRIVY COUNCIL APPEALS. 2.

PRIVY COUNCIL APPEALS—CANADA—*Quebec—Advances—Purchases by Husband in Names of Wife and Daughter — Advances — Account by Mandatory before Action—Gifts by Husband to Wife—Civil Procedure Code, s. 6.*

The appellant after his wife's death sued his daughter, the respondent, to recover as creditor of herself and his wife's estate moneys which he alleged that he had advanced to purchase properties in Quebec to which she was entitled either in her own right or under his wife's will:—

Held, on the evidence, that he had failed to establish his claim.

And, *quære*, whether advances made as his wife's mandatory in charge of her estate could be recovered in a suit brought before he had rendered an account of rents and moneys received in that character as well as disbursements.

Quære, also, if the advances were in the nature of gifts, whether those gifts were valid by the Quebec law or by s. 6 of the Code of Civil Procedure. EDDY *v.* EDDY - - **P. C. 299**

2. —— *Quebec—Builder's Privilege—Hypothecary Privilege—Civil Code of Lower Canada, arts.* 2013 *G and* 2103—59 *Vict. c.* 42.

Held, that under the Civil Code, as amended by 59 Vict. c. 42, a builder's privilege is limited to one year from the date of registration thereof; and, with regard to an hypothecary privilege conferred on suppliers of materials, it only arises on notice being given to the proprietor under art. 2013 G, and registered under art. 2103, and lapses unless the prescribed legal proceedings are taken within three months from the date of notice. LA BANQUE D'HOCHELAGA *v.* STEVENSON **P. C. 600**

PRIVY COUNCIL APPEALS—CANADA—*contd.*

3. —— *Quebec — Contract — Construction — Breach of Contract—Appeals from Judgment on Petition of Right.*

Where the respondent contracted with the Government to execute for a term of years the printing and binding of certain public documents at stipulated prices, but the Government did not expressly contract to give to the respondent all or any of the said work:—

Held, that a stipulation to that effect could not be implied, and that there was no breach of contract by reason of orders for work being withheld.

An appeal lies to Her Majesty in Council from a decision of the Court of Queen's Bench on a petition of right. THE QUEEN *v.* DEMERS **P. C. 103**

4. —— *Quebec—Intoxicating Liquors—Canada Temperance Act*, 1864 (27 & 28 *Vict. c.* 18), *s.* 17 *—Construction.*

There having been numerous convictions of the respondent, with accumulated penalties amounting to $1400, for having on various occasions sold intoxicating liquor, and thereby committed offences under the Canada Temperance Act of 1864, a certiorari was granted in one case by the Superior Court, on the ground that by the true construction of s. 17, which provides that two or more offences by the same party may be included in the same complaint, a penalty of $100 was sufficient for all offences under the Act during the limitation period of three months prescribed by s. 15:—

Held, that, in the absence of express words to that effect, s. 17 must be construed as permissive merely, and not imperative. WENTWORTH *v.* MATHIEU - - - - **P. C. 212**

5. —— *Quebec—Stockbroking Transactions—Civil Code, art.* 1233, "*Commercial Matters*"—*Art.* 1233 (7.), *Commencement of Proof in Writing —Art.* 1233 (6.), *Notice to Produce—Authority to Stockbrokers is on Stock Exchange Terms—Law of Lower Canada.*

In an action by stockbrokers against their principal to recover the balance of their account in respect of sales and purchases of shares for private speculation on his account:—

Held, (1.) that these transactions were "commercial matters" within art. 1233, Civil Code, which the plaintiffs might prove by oral evidence; and that a plaintiff was a competent witness under s. 2 of 54 Vict. c. 45.

(2.) An admission by the defendant in his deposition that he employed the plaintiffs as his stockbrokers, and that they bought and sold something for him, is a sufficient commencement of proof in writing under art. 1233 (7.) to let in oral evidence of the particulars.

(3.) Art. 1233 (6.) authorizes reception of secondary evidence of bought and sold notes in possession of the adverse party without a notice to produce; and an objection thereto not taken at the trial cannot be taken on appeal.

(4.) The defendant in giving authority to the

PRIVY COUNCIL APPEALS—CANADA—*contd.*
plaintiffs to do business on the Stock Exchange must be taken, in the absence of evidence to the contrary, to have employed them on the terms of the Stock Exchange, and, therefore, to have authorized the sale of his shares on failure to supply them with the requisite funds. FORGET *v.* BAXTER - - - - P. C. 467

—— Accumulations — Substitution — Annuity—Construction of will - - 569
See WILL. 2.

—— Contract—Conditional promise to consider a proposal favourably - - 595
See CONTRACT. 2.

6. —— **CAPE OF GOOD HOPE**—*Contract—Construction—"Flotation"—British South Africa Company's Mining Ordinance*, 1890, *ss.* 26, 27, 28—*Company.*

Where a prospector agreed with a syndicate that his pay for services rendered in Matabeleland or Mashonaland should be 250*l.* on flotation by the syndicate of every block of ten claims pegged by him, and the syndicate agreed to sell 330 claims pegged by the prospector to a substantial company which had for one of its principal objects the developing and working of gold mines:—

Held, that this was a flotation of the claims within the meaning of the agreement, and that the provisions of the Mining Regulations of 1890, ss. 26, 27, and 28, were not imported into the agreement so as to limit the meaning of flotation to one by the British South Africa Company or by the claimholder with their consent, in either case after the grant of an inspection certificate. TORVA EXPLORING SYNDICATE *v.* KELLY P. C. 612

7. —— **CHINA** — *Land taken for Public Purposes—"Extension" of Roads—Shanghai Land Regulation VI. of* 1869—*Construction.*

Shanghai Regulation VI. of 1869 authorized the municipal council of that place to take the respondent's land as being required for the "extension of the lines of roads at present laid down as means of communication in the settlement." A proviso directed that no appropriation "for roads other than those already defined" shall be sanctioned or held lawful:—

Held, that, on the true construction of the regulation, "extension" is not restricted to the enlargement of an existing road by adding to its length or breadth, but includes new lateral branches therefrom; and that the roads "already defined" are the roads mentioned in the whole of the preceding part of the regulation including the extensions. SHANGHAI MUNICIPAL COUNCIL *v.* MCMURRAY - - - - P. C. 206

—— **GUERNSEY**—Illegal stretching of telephone wires across streets — Powers of local authority—Removal - - 317
See TELEPHONE.

8. —— **JAMAICA** — *Practice — Trial—New Trial—Question of Fact not submitted to Jury—Issue of Fact as to Variation of Easement claimed—Jamaica Code of Civil Procedure*, *s.* 438.

In an action by the respondents for damages in respect of a nuisance committed by the appellants and for an injunction, it was alleged that the appellants, who had a prescriptive right to load, unload, and store coals on their wharf in such manner as to spread their coal dust over the respondents' wharf, had within twenty years so extended the site of their operations and altered the structure of their works and the conduct of their business as to produce injurious effects not covered by any prescriptive right. The question submitted was whether the appellants' works taken as a whole had by their extension been rendered more injurious than before to the respondents' works taken as a whole. The jury found that there had been no increase in inconvenience and discomfort to the respondents, and a verdict was entered for the appellants. On motion before the Full Court judgment was given for the respondents, on the ground that the change in the incidence of the dust produced by the extension and alteration of site and works so altered the nature of the easement as to constitute a new wrong:—

Held, on appeal, that the question whether by this extension and alteration there had been a variation in the kind of servitude imposed on the respondents substantial enough to cause a new and appreciable wrong was a question of fact which had not been submitted to the jury, and that there must be a new trial.

Under s. 438 of the Jamaica Code of Civil Procedure the Court cannot decide a question of fact never submitted to the jury, though it may draw inferences of fact not inconsistent with the findings. ROYAL MAIL STEAM PACKET COMPANY *v.* GEORGE & BRANDAY - - P. C. 480

9. —— **NATAL**—*Will—Contract by Spouses to bring themselves within the Law—Registration—Mutual Will—Construction—Natal Law No.* 22 *of* 1863, *s.* 7.

By s. 7 of Natal Law No. 22 of 1863, passed to prevent community of goods attaching to certain marriages, persons married in South Africa can bring themselves under its provisions by a registered written instrument to that effect:—

Held, that, by the true construction of that section, if the instrument is unregistered it is inoperative for all purposes and as between the parties.

Where husband and wife, not within Law No. 22, by mutual will directed their executors to sell the testator's estate as soon as convenient after the testator's death without specifying a date for payment of legacies directed by the testator, and so soon after the death of the testatrix as may be to pay the legacies directed by her:—

Held, that by the true construction of the will the testator's legacies were payable at his death. The intention to dispose of everything was apparent, and the words did not necessitate the suspension of payment of testator's legacies with consequent intestacy as to the resulting income, TAYLOR *v.* B. STURROCK. W. STURROCK *v.* B. STURROCK - - - - P. C. 225

10. —— **NEW SOUTH WALES**—*Interest in Land—New South Wales Real Property Act*, 1862 (26 *Vict. No.* 9), *s.* 117—*Construction—Limitation—Sect.* 122—*Rights of Beneficiaries whose Trustees are barred—Bankruptcy.*

Where a rent-charge or annuity is held by

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*continued.*

trustees to be applied by them for the maintenance and education of children or the survivor:—

Held, that the children take a joint interest therein, but that the shares of the minors are to be applied as directed.

The interest of each child is an interest in land within the meaning of the New South Wales Real Property Act, s. 117.

Where the estate out of which the rent-charge issued passed to a bankrupt's assignee under a certificate of title negligently granted to the bankrupt free of incumbrance:—

Held, in an action brought by the beneficiaries against the Registrar-General for compensation out of the assurance fund created by the said Act, that their rights, being under the Act independent of the trustees and being saved by the provisions of the Act (see s. 122) in regard to persons under disability, could be enforced notwithstanding that their trustees' rights were barred. WILLIAMS *v.* PAPWORTH - - - - **P. C. 563**

11. —— *Revenue—Income Tax—Assessment—Income from Ore produced in New South Wales and sold outside it—New South Wales Income Tax Act*, 1895 (59 *Vict. No.* 15), *s.* 15, *sub-ss.* 3, 4.

Where income was in part derived from the extraction of ore from the soil of New South Wales Colony, and from the conversion in the latter Colony of the crude ore into a merchantable product:—

Held, that this income was assessable under the New South Wales Land and Income Tax Assessment Act of 1895, s. 15, sub-ss. 3, 4, notwithstanding that the finished products were sold exclusively outside the Colony.

In re Tindal, (1897) 18 N. S. W. L. R. 378, overruled. COMMISSIONERS OF TAXATION *v.* KIRK **P. C. 588**

—— Administration suit — Separate account, Fund carried to—Assignment—Notice—Equity against assignee - - **431**
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—— Cablegrams—Mistake—Action on contract—Onus probandi - - - **176**
See CONTRACT. 4.

—— Contract — Admissibility of extrinsic evidence—"Total cost of works" - **182**
See CONTRACT. 3.

—— Contract—Rescission—Title of trustee for sale who has purchased for himself—Effect of beneficiaries consenting—Intermediate sale to third party - **499**
See VENDOR AND PURCHASER.

—— Joint gold-mining lease—Notice of abandonment by a joint lessee - - **293**
See MINES. 1.

—— Will—Accumulations—Rents and royalties from mining leases—Tenants for life—Remaindermen - - - **163**
See WILL. 1.

—— Will—Alternative devise—Vested interests—Divesting—Construction of will **628**
See WILL. 5.

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12. —— **NEW ZEALAND**—*Railway—Effect of an Order in Council retaining a Railway as Government Property—Rights of Debenture-holders—New Zealand Railways Construction and Land Act*, 1881 (44 *&* 45 *Vict. No.* 37), *ss.* 123, 125, 126.

Under New Zealand Railways Construction and Land Act, 1881, ss. 125 and 126, the Governor of the Colony, having taken possession of a railway under s. 123, is empowered on the happening of events in the later section specified to declare his intention to retain the railway as Government property:—

Held, that on publishing an Order in Council giving effect to such intention, his title to the railway is absolute and paramount, and that the rights of debenture-holders whose debentures were authorized by a later Act in 1884 to be a first charge on the railway fall with the company's title. COATES *v.* THE QUEEN **P. C. 217**

—— Principal and agent—Authority of agent—Consideration moving from the principal—Special damage - - - **577**
See PRINCIPAL AND AGENT.

—— Separation and annuity deed—Suit to set it aside—Discredited fraudulent representations—Subsequent adultery of wife **446**
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—— Will—Lost will—Evidence—Presumption that it was destroyed by testator—Presumption against fraudulent abstraction
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—— **ST. LUCIA** — Practice — Special leave to appeal—Appeal in formâ pauperis **496**
See PRACTICE. 1.

13. —— **SOUTH AUSTRALIA** — *Revenue — Succession Duty—Covenant to Pay—"With Intent to evade Payment of Duty"—South Australian Succession Duties Act*, 1893 (56 *&* 57 *Vict. No.* 567), *ss.* 16, 27—*Construction.*

The deceased covenanted to pay 200,000*l.* to his children with interest at 1½ per cent. per annum, the debt being payable at call. He regularly paid the interest, but no portion of the principal:—

Held, that this covenant, in the absence of evidence to the contrary, conferred on the children complete ownership of the debt, and was a non-testamentary disposition of property within the meaning of the South Australian Succession Duties Act, 1893, s. 16, not subject to duty under s. 17, as the testator died more than three months thereafter:

Held, further, that it was not chargeable with double duty under s. 27, as made "with intent to evade the payment of duty hereunder" in the absence of evidence of some device or contrivance for that purpose. SIMMS *v.* REGISTRAR OF PROBATES - - - - - **P. C. 323**

14. —— **VICTORIA**—*Vermin Destruction Act*, 1890 (54 *Vict. No.* 1153)—*Local Government Act*, 1890 (54 *Vict. No.* 1112), *s.* 428—*Vermin-proof Swing Gates—Law of Victoria.*

Under the provisions of the Victoria Vermin Destruction Act, 1890, vermin-proof swing gates can be lawfully put across roads other than main roads by owners of lands, whether adjoining

PRIVY COUNCIL APPEALS — VICTORIA—*continued.*
owners or single owners, with the consent of the shire council, whether such lands are in special areas as defined by the Act or not.
Sect. 428 of the Local Government Act, 1890, does not, having regard to the exception therein contained, interfere with landowners' rights in this respect. KING *v.* CHEYNE - **P. C. 622**

—— Award — Lump sum — Evidence taken on matters not referred — Jurisdiction of arbitrators - - - - **452**
See ARBITRATION.

—— Contract—Authority of agent—Lump sum —Variation—Ratification - **190**
See CONTRACT. 1.

—— **WINDWARD ISLANDS**—Practice—Special leave to appeal — Appeal in formâ pauperis - - - - **496**
See PRACTICE. 1.

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See PRIVY COUNCIL APPEALS. 5. **467**

PROFITS—Secret profit by promoters—Duty of disclosure - - - - **240**
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PROMOTER—Secret profit by promoters—Duty of disclosure - - - **240**
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See PRACTICE. 2.

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QUINQUENNIAL VALUATION — Alteration in value of hereditament—Cause of alteration—Onus of proof - - **510**
See RATES. 2.

RAILWAY — *Minerals — Notice of Intention to Work — Compensation — Arbitration — Duty of Company to take up Award—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 35.
A railway company, having (though under protest) appointed an arbitrator and joined in the arbitration under the Lands Clauses Consolidation Act, 1845, in respect of a claim for the purchase of minerals, must take up the award and furnish a copy to the claimants in accordance with s. 35 of the Act; and a mandamus may be granted to compel them. The validity of the award may be contested later.
The decision of the Court of Appeal, [1899] 1 Q. B. 921, affirmed on this ground. LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* WALKER - - - - **H. L. (E.) 109**

—— New Zealand Railways Construction and Land Act—Rights of debenture-holders
See PRIVY COUNCIL APPEALS. 12. **217**

—— Way-leave—Construction — Ancient document—Contemporaneous usage or interpretation - - - - **260**
See WAY-LEAVE.

RATES—*Artificial Reservoir — District Rate — "Land covered with Water" — Proportionate Rating—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).
An artificial reservoir is "land covered with water" for the purpose of assessment in the proportion of one-fourth part only of its annual value under the Public Health Act, 1875, s. 211, sub-s. 1 (*b*).
The decision of the Court of Appeal, [1899] 1 Q. B. 273, affirmed on this point. HAMPTON URBAN COUNCIL *v.* SOUTHWARK AND VAUXHALL WATER COMPANY - - - **H. L. (E.) 3**

2. —— *Quinquennial Valuation — Supplemental Valuation List—Provisional Valuation List —Alteration in Value of Hereditament—Cause of Alteration—Onus of Proof—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 43, 46, 47.
To justify an alteration of the quinquennial valuation of a hereditament by a supplemental or provisional valuation list under the Valuation (Metropolis) Act, 1869, ss. 46, 47, those who seek to alter the assessment must not only prove that there has been an alteration in the annual value of the hereditament, but must also prove the nature and cause of that alteration and that the cause is one which directly affects the assessable value of that particular hereditament. It is not enough, for instance, to shew merely that since the quinquennial valuation there has been throughout the metropolis a general rise in the annual value of the class of property to which the hereditament in question belongs, and that the annual value of that hereditament has increased accordingly.
The decision of the Court of Appeal, [1900] 1 Q. B. 68, affirmed. CAMBERWELL ASSESSMENT COMMITTEE *v.* ELLIS - - **H. L. (E.) 510**

— Highway — Exemption — Liability to repair ratione tenuræ—Sum paid in discharge of liability - - - - **345**
See HIGHWAY.

— Public-house—Evidence of trade and profits—Rateable value - - - **150**
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RATIFICATION—Contract—Authority of agent —Lump sum—Variation - - **190**
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RENTS AND PROFITS—Life-rent—"Opened" mines - - - - 83
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REPAIRS—Highway—Rate — Exemption—Liability to repair ratione tenuræ—Sum paid in discharge of liability - 345
See HIGHWAY.

REPORT — Newspaper — Reports of public speeches—"Author" of report - 539
See COPYRIGHT.

RESCISSION—Contract—Title of trustee for sale who has purchased for himself—Effect of beneficiaries consenting — Intermediate sale to third party - 499
See VENDOR AND PURCHASER.

RESERVOIR — Rates — Artificial reservoir — "Land covered with water" - 3
See RATES. 1.

REVENUE—*Estate Duty — Gift — Exclusion of Benefit to Donor—Settlement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*).

By deed in 1885 real and personal estate was given by the owner to the appellant subject to an annual rent-charge issuing out of the realty, the appellant covenanting to pay the rent-charge and all the funeral and testamentary expenses and all the donor's debts at his death to the full exhaustion of all his property. In the event of the appellant's death in the donor's lifetime, or of any breach of covenant by the appellant, the donor had power to revoke the deed wholly or in part: any revocation to be without prejudice to any purchase or mortgage made before the revocation. The donor released the rent-charge and power of revocation by deed in September, 1894, and died in October, 1894:—

Held, that benefits having been reserved to the donor, estate duty was payable upon all the property comprised in the deed of 1885 as property passing upon the death of the donor within the meaning of the Finance Act, 1894, ss. 1, 2, sub-s. 1 (*c*).

The decision of the Court of Appeal, [1898] 2 Q. B. 534, affirmed. EARL GREY *v.* ATTORNEY-GENERAL - - - - **H. L. (E.) 124**

2. —— *Inhabited House Duties—Exemption in favour of Buildings occupied for Trade only*—48 *Geo.* 3, *c.* 55, *Sched. B, r.* 3—57 *Geo.* 3, *c.* 25, *s.* 1—5 *Geo.* 4, *c.* 44, *s.* 4—*Customs and Inland Revenue Act*, 1878 (41 & 42 *Vict. c.* 15), *s.* 13, *sub-s.* 2.

By sub-s. 2 of s. 13 of the Customs and Inland Revenue Act, 1878, "Every house or tenement which is occupied solely for the purposes of any trade or business or of any profession or calling by which the occupier seeks a livelihood or profit shall be exempted from the duties (on inhabited houses) by the said commissioners upon proof of the facts to their satisfaction."

The appellant was the owner of a building of two storeys under one roof situate in Portobello, Edinburgh. The ground-floor was occupied by the appellant to carry on the trade of a licensed retailer of spirits, and was numbered 49, Bath Street. The upper storey was occupied by the appellant as his dwelling-house, and was numbered 47, Bath Street. Access to the dwelling-house was by a door opening from the public street, and by a staircase from that door which led up to the upper storey. Access to the public-house was by a different door also opening from the street. There was no internal communication between the dwelling-house upon the upper storey and the public-house on the ground-floor:—

Held, reversing the decision of the First Division of the Court of Session, (1898) 25 R. 1040, that the public-house was exempt from inhabited house duty, and that the duty ought to be confined to the value of that portion of the building used as a dwelling-house. GRANT *v.* LANGSTON **H. L. (Sc.) 383**

3. —— *Stamp—Agreement for Hire of Chattel in consideration of Yearly Payment — "Bond, Covenant, or Instrument of any kind whatsoever"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

The words "Bond, Covenant, or Instrument of any kind whatsoever" in the 1st schedule to the Stamp Act, 1891, include an agreement not under seal.

The decision of the Court of Appeal, [1899] 1 Q. B. 250, affirmed. NATIONAL TELEPHONE COMPANY *v.* INLAND REVENUE COMMISSIONERS **H. L. (E.) 1**

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—— Succession duty—South Australia, Laws of —Covenant to pay—"With intent to evade payment of duty" - - 323
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REVOCATION—Will — Construction — Intention —Estate tail - - - 127
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SHANGHAI—Land taken for public purposes—"Extension" of roads - - 206
See PRIVY COUNCIL APPEALS. 7.

SHIPPING—*Charterparty—Ballast—Obligation of Shipowner to Supply—Responsibility for Navigation—Construction of Charterparty.*

By a charterparty a ship was let to the charterers for their sole use and benefit for the conveyance of merchandise $\frac{\text{and}}{\text{or}}$ passengers with liberty to sub-let (subject to owner's approval of trade) for two or three round voyages at charterer's option, to be placed by a certain day "with clear holds" at the disposal of the charterers, they "having the whole reach or burthen of the vessel," proper and sufficient room being reserved to the owners for the officers, crew, tackle, &c.; the owners undertaking to maintain her in a thoroughly efficient state during the currency of the charter; the captain to use every reasonable despatch in prosecuting the voyages, and (though appointed by the owners) to be under the orders and directions of the charterers as regards employment, agency and other arrangements; the freight for the hire of the ship to be paid monthly until she was returned by the charterers to the owners:—

Held, that upon the true construction of the whole of the charterparty (without deciding whether the contract more nearly resembled one of demise than of carriage) the responsibility for the navigation of the ship was imposed upon the owners, and that the owners were therefore liable to provide any ballast that might be necessary for safe navigation.

The decision of the Court of Appeal, [1900] 1 Q. B. 28, affirmed. WEIR *v.* UNION STEAMSHIP COMPANY - - - - H. L. (E.) 525

SHIPPING—*continued.*

2. —— *Charterparty — Full and Complete Cargo—Cargo in Frozen Condition.*

By a charterparty made in contemplation of a mid-winter loading the charterers agreed to load at a port in the United States "a full and complete cargo of wet wood pulp which contains about 50 per cent. of water." The charterers loaded pulp of that description which was frozen. Frozen pulp is not compressible, and occupies more space than when unfrozen; consequently the cargo was less in quantity than it would have been in summer. The shipowners having brought an action against the charterers for the loss of freight thus caused, evidence was given that in winter wet pulp was usually loaded in a frozen condition:—

Held, that the obligation to load a full and complete cargo had been performed by loading as much pulp in a frozen condition as the ship would carry.

The decision of the Court of Appeal, [1899] 2 Q. B. 364, affirmed. STEAMSHIP ISIS COMPANY *v.* BAHR - - - - H. L. (E.) 340

3. —— *Collision—Damages—Loss of Use of Lightship—Remoteness of Damage.*

A lightship, belonging to a harbour board and used for lighting approaches, was damaged in a collision caused by the negligence of the appellants. The place of the damaged lightship was during her repair taken by another lightship belonging to the board and maintained at an annual expense for the purpose of such an emergency:—

Held, that the board was entitled to recover from the appellants not only the out of pocket expenses caused by the collision, but also substantial damages for the loss of the services of the damaged lightship during the time her place was taken by the substituted lightship.

The Greta Holme, [1897] A. C. 596, held applicable.

The decision of the Court of Appeal, [1899] P. 127, affirmed. OWNERS OF STEAMSHIP "MEDIANA" *v.* OWNERS, MASTER AND CREW OF LIGHTSHIP "COMET." THE "MEDIANA" H. L. (E.) 113

4. —— *Collision—Second Anchor Light—"At or near the Stern"—Regulations for Preventing Collisions at Sea*, 1897, *art.* 11.

The decision of the Court of Appeal, [1899] P. 230, reversed on the facts so far as the *Gannet* was held to be in fault; and the decision of Bucknill J. that the *Algoa* was alone in fault restored. OWNERS OF STEAMSHIP "GANNET" *v.* OWNERS OF STEAMSHIP "ALGOA." THE "GANNET" H. L. (E.) 234

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TELEPHONE — *Illegal Stretching of Telephone Wires across Public Streets — Powers of Local Authority—Removal of Wires—Law of Guernsey.*

In a suit by a telephone company against the local authority to recover damages for cutting down and removing telephone wires stretched across a public street, it appeared that the company was not authorized by statute so to place their wires:—

Held, that the action failed. The removal

TELEPHONE—*continued.*
was within the legal powers of the defendants, and there was no allegation of any unnecessary damage having been caused by the cutting. NATIONAL TELEPHONE COMPANY *v.* CONSTABLES OF ST. PETER PORT - - - **P. C. 317**

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TRUSTEE—*Breach of Trust—Immunity Clause—Liability of Trustee — Negligence — Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 17, *sub-s.* 3.

Three persons were trustees of a fund set apart to answer a life annuity and divisible on the decease of the annuitant among the persons entitled in remainder. The sum of 3700*l.*, part of this fund, was invested on a heritable bond. On July 15, 1887, the bond was paid off. The trustees allowed their law agent to receive the money, and to retain it in his hands uninvested for rather over six months. At the end of that time the law agent became bankrupt, and the greater part of the fund was lost:—

Held, reversing the decision of the First Division of the Court of Session (Lord Morris dissenting), (1898) 25 R. 697, that the trustees were guilty of a plain and positive breach of trust, and were liable to replace the money lost. WYMAN *v.* PATERSON - - **H. L. (Sc.) 271**

—— Limitations, Statue of — Rights of beneficiaries whose trustees are barred — Interest in land—Law of New South Wales - - - - **563**
See PRIVY COUNCIL APPEALS. 10.

—— Title of trustee for sale who has purchased for himself—Effect of beneficiaries consenting — Intermediate sale to third party - - - - **499**
See VENDOR AND PURCHASER.

UBERRIMA FIDES—Guarantee—Concealment of material facts - - - **135**
See INSURANCE, GUARANTEE.

VALUATION — Quinquennial — Alteration in valuation of hereditament — Cause of alteration—Onus of proof - - **510**
See RATES. 2.

VARIATION—Contract—Authority of agent—Lump sum—Ratification - - **190**
See CONTRACT. 1.

VENDOR AND PURCHASER—*Rescission of Contract—Title of Trustee for Sale who has purchased for himself—Effect of Beneficiaries consenting—Effect of Intermediate Sale to a Third Party—Laws of New South Wales.*

In an action by a purchaser of land against a vendor for rescission of contract:—

Held, that the title disclosed being that of a purchaser from himself as trustee for sale, it was inequitable to force it upon the plaintiff.

A defence that, notwithstanding the form of the transaction, the defendant really derived title from the beneficiaries who assented to the transaction with full knowledge of all the circumstances must be proved by clear affirmative evidence to that effect.

A further defence that there had been an intermediate sale to a third person and a purchase by the trustee from him will not avail unless that sale were a completed one.

A trustee cannot adopt for his own benefit an executory contract to purchase to which he is a party as vendor: *Parker* v. *McKenna*, (1874) L. R. 10 Ch. 96. WILLIAMS *v.* SCOTT **P. C. 499**

VERMIN—Vermin-proof swing gates — Vermin Destruction Act, 1890—Law of Victoria
See PRIVY COUNCIL APPEALS. 14. **622**

VESTED INTERESTS—Divesting—Construction of will—Alternative devise - **628**
See WILL. 5.

VICTORIA—Laws of.
See PRIVY COUNCIL APPEALS—VICTORIA.

WATER— Rates — Artificial reservoir — "Land covered with water" - - **3**
See RATES. 1.

WATER-MARK — Minerals — Coal below low water-mark — Barony title — Lease of coals—Minor—Adoption - - **48**
See MINES. 2.

WATERWORKS—"*Heritor*"—*Church and Manse—Assessment of Way-leave — Scottish Act*, 1663 (*c.* 21 *or c.* 31).

The Scottish Act, 1663 (c. 21 or c. 31): "Wher competent manses are alreadie built, ordaines the heritors of the paroche to releive the minister and his executors of all costs charges and expenses for repairing of the forsaids manses." A conduit of the Glasgow Waterworks Commissioners was carried underground through lands in a parish in virtue of grants of way-leave in perpetuity, obtained from the proprietors of the land:—

Held, affirming the decision of the First Division of the Court of Session, (1899) 1 F. 523, that the commissioners were liable under the Act of 1663 to assessment in respect of their conduit as "heritors" of the parish for the repair of the manse. GLASGOW CORPORATION *v.* M'EWAN **H. L. (Sc.) 91**

WAY-LEAVE—*Landowner—Railway Company—Agreement for Lease—Construction of Way-leave—Ancient Document—Contemporaneous Usage or Interpretation.*

By deed in 1854 H. agreed to grant to a railway company a way-leave and right to make railways through his land for the term of 1000 years, the company paying H. a specified rent on coal carried over "any part of the railways comprehended in" a bill which afterwards became the company's special Act of 1854 and which should be shipped at Port B. The railways were constructed and for more than forty years rent was paid by the company for coal carried over the railways and shipped at Port B., when the coal passed over H.'s land, no rent being paid or claimed for coal carried over the railways and shipped at Port B. but not passing over H.'s land. In an action brought by H.'s successor against the company:—

Held, that the words in the deed were plain and unambiguous; that the fact that the parties had interpreted the words in a sense different from that which the words themselves plainly bore could not affect the construction; that the company were liable to pay the rent upon coal conveyed over any part of the railways comprehended in the special Act and shipped at Port B., although it did not pass over H.'s land, and that the plaintiff was entitled to an account for the six years prior to the issue of the writ.

The decision of the Court of Appeal, [1899] 1 Ch. 656, affirmed. NORTH EASTERN RAILWAY COMPANY *v.* LORD HASTINGS - H. L. (E.) 260

—— Assessment of way-leave—"Heritor"—Church and manse - - - 91
See WATERWORKS.

WIFE.
See HUSBAND AND WIFE.

WILL—*Accumulations—Direction to Accumulate—Rents and Royalties from Mining Leases—Tenants for Life—Remaindermen—Construction of Will—Appeal from New South Wales.*

A testator devised his residue upon trust to convert with power to postpone conversion for twenty-one years, and with a direction that the surplus income of the unconverted estate during the twenty-one years and all accumulations thereof should go in augmentation of capital. The residue was settled on trusts for tenants for life and remaindermen. The trustees under powers in the will granted a mining lease, and retained the leased property unconverted for more than twenty-one years:—

Held, that the rents and royalties received under the mining lease during the twenty-one years ought to be invested, and that the income therefrom ought to be invested and accumulated:

Held, also, that after the twenty-one years, the tenants for life of settled shares in the residue were entitled to receive out of the rents and royalties such an annual sum as in the opinion of the Court would under all the circumstances of the case be a fair equivalent for the annual income that would have resulted if the estate had been converted.

The rule laid down in *Meyer* v. *Simsonsen*, (1852) 5 De G. & Sm. 723, and *Brown* v. *Gellatly*, (1867) L. R. 2 Ch. 751, approved. WENTWORTH *v.* WENTWORTH - - - - P. C. 163

2. —— *Accumulations—Substitution—Annuity—Construction of Will—Appeal from Quebec.*

A testator set apart a fund as a provision for his wife and also for his children until majority or marriage. He gave the residue of his estate to his children living at his death, and directed that it should be divided on the death of all of them. He further directed that from majority or marriage each child was to receive the revenue derivable from his share limited to $6000 a year, each child being charged with a substitution in favour of his or her children:—

Held, in a suit brought by the eldest son to recover arrears of his annuity of $6000 a year, that according to the true intention of the testator as disclosed by the words of the will—

(1.) the annuity of each child is a charge on the revenue of his own share and its arrears, not on the total revenue of the estate;

(2.) each child was entitled from the testator's death to an equal share of the net revenue current and accumulated: without regard to the benefits which during minority he receives from the fund set apart or under other clauses of the will;

(3.) the substitution is confined to the share of each child in the capital of the residue, and does not extend to the accumulation of its revenue. BEAUDRY *v.* BARBEAU - P. C. 569

3. —— *Estate Tail—Intention—Revocation—Construction of Will—Wills Act* (1 *Vict. c.* 26), *s.* 28.

A testator by his will devised his fee simple estates to trustees to give the rents to S. M.; but in case S. M. encumbered the lands or rents at any time the testator revoked the gifts of the rents "from S. M. and from his heirs male," or should S. M. not forfeit the same and should "die without male issue him surviving," he bequeathed the rents and estates to R. M. and his issue male in tail male:—

Held, that upon the true construction of the whole will the testator's intention was clear that S. M. should take an estate tail.

The decision of the Irish Court of Appeal, [1899] 1 I. R. 359, affirmed. CRUMPE *v.* CRUMPE H. L. (I.) 127

4. —— *Lost Will—Evidence—Presumption that it was Destroyed by Testator—Presumption against Fraudulent Abstraction—Appeal from New Zealand.*

Where a will duly executed, traced to the testator's possession and last seen there, is not forthcoming on his death, the presumption is that it was destroyed by himself. To rebut it there must be sufficient evidence that it was not destroyed by the testator animo revocandi; and *held* in this case that concurrent findings that it had not been rebutted could not be disturbed. There is a presumption against its fraudulent abstraction either before or after his death, but the circumstances which render such abstraction possible must be taken into account in arriving at the result of the evidence. ALLAN *v.* MORRISON P. C. 604

5. —— *Vested Interests—Divesting—Construc-*

WILL—*continued.*

tion of Will—Alternative Devise—"Such as should be living at Widow's Death and attain Twenty-one"—Appeal from New South Wales.

Where there is a devise to five persons nominatim, or to such of them as should be living at the death of the testator's widow and attain twenty-one:—

Held, that all the devisees take vested interests in fee subject to be divested as regards each devisee dying in the lifetime of the widow in favour of those (if any) who survive her and attain twenty-one.

But where later clauses gave to each devisee a specifically described portion of the land devised for life in the event of all the devisees surviving the widow, and declared that "in case of the death of any of the before-mentioned persons he gave and devised the share to which he would have been entitled" to his heir:—

Held, that the effect of this declaration was to alter the original devise, and to give the share of a devisee dying in the widow's lifetime to his heir, and not to the surviving devisees. PENNY *v.* COMMISSIONER FOR RAILWAYS - P. C. 628

—— Natal law—Mutual will - - 225
See PRIVY COUNCIL APPEALS. 9.

WINDWARD ISLANDS—Practice—Special leave to appeal—Appeal in formâ pauperis
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